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IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c.210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

Canadian Jewish Congress

COMPLAINANT

AND:

North Shore Free Press Ltd. operating as North Shore News and Doug Collins

RESPONDENTS

AND:

The Attorney General of British Columbia

AND:

The Deputy Chief Commissioner of the British Columbia Human Rights Commission

AND:

The British Columbia Press Council

INTERVENOR

AND:

The British Columbia Human Rights Coalition

INTERVENOR

AND:

The Chinese Benevolent Association of Vancouver

INTERVENOR

AND:

The B.C. Civil Liberties Association

INTERVENOR

REASONS FOR DECISION

Tribunal Member:
Place and date of hearing:

Nitya Iyer
Vancouver, British Columbia
May 12-16, May 20-23, May 26-29, 1997
June 2, June 23-27, 1997

APPEARANCES:

Counsel for the Complainant:	Gregory Walsh and Gerald Cuttler
Counsel for the Respondent:	David Sutherland and Jonathan Hodes
Counsel for the Attorney General of British Columbia:	Lisa Mrozinski
Counsel for the Deputy Chief Commissioner:	Angela Westmacott
Counsel for the B.C. Press Council:	Roger McConchie and Michael Skene
Counsel for the B.C. Human Rights Coalition:	Judy Parrack and Katherine Hardy
Counsel for the Chinese Benevolent Association:	Brahm Martz
Counsel for the B.C. Civil Liberties Association:	Murray Mollard

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I. Background:

This case arises out of two complaints laid by the Complainant, Canadian Jewish Congress, against the respective Respondents, Dcug Collins and North Shore Free Press Ltd. doing business as North Shore News, about an opinion column entitled "Hollywood Propaganda" published on March 9, 1994 in the North Shore News. The essence of the complaints was that the article was likely to expose Jewish persons to hatred or contempt on the basis of their race, religion or ancestry, contrary to s. 2(1) of the *Human Rights Act* ("Act"), now s. 7(1) of the *Human Rights Code*, R.S.B.C. 1996, c. 210 as amended by R.S.B.C. 1996, c. 210 (Supp.) ("Code"). There is no dispute that Mr. Collins wrote the column, nor that it was published in the North Shore News.

A brief chronology of events provides the necessary background. The Complainant initially contacted the B.C. Council of Human Rights ("Council") on May 26, 1994. The Council assigned an investigator to the complaints in late October of that year. An Amended Complaint Information Form, dated November 28, 1994, was filed with the Council on December 2, 1994. Although, technically, there were two complaints, one against each of the named Respondents, the substance of each complaint was the same, and they were combined in a single Complaint Information Form. For convenience, therefore, throughout this decision, I refer to the "complaint" rather than to two complaints.

The investigation report was dated August 16, 1995. Responses to the investigation report were received from the parties by mid-November, 1995. The complaint was referred for a determination under s. 14 of the *Act* on March 19, 1996. It was referred to hearing on July 30, 1996 and Tom Patch was designated as the Council member who would hear the complaint. The Respondents' Notice of Constitutional Question was received by the Council on October 8, 1996.

On January 1, 1997, the Council was replaced by the B.C. Human Rights Commission ("Commission") and the B.C. Human Rights Tribunal ("Tribunal"). On April 21, 1997, s. 2 of the former *Act* became s. 7 of the new *Code*¹.

¹ These changes are discussed in more detail under II.A.2, below.

There was considerable correspondence between the parties and the Council/Tribunal, various preliminary motions, and an in-person pre-hearing conference between the fall of 1996 and spring of 1997. Certain of these pre-hearing decisions should be mentioned.

In his letter of February 5, 1997, Mr. Patch determined that the Tribunal has the jurisdiction to consider whether the legislative provision in issue violates the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, and that the evidence and arguments on both the *Charter* issue and the merits of the complaint should be heard together (see Appendix 1.1).

On March 13, 1997, Mr. Patch decided that certain other complaints filed by another complainant against the Respondents should not be consolidated with the Canadian Jewish Congress complaint (see Appendix 1.2).

By letters of March 4 and April 11, 1997, Mr. Patch granted intervenor status to four organizations: the British Columbia Press Council ("Press Council"), the B.C. Human Rights Coalition ("BCHRC"), the Chinese Benevolent Association of Vancouver ("CBAV"), and the British Columbia Civil Liberties Association ("BCCLA"). The Press Council, the BCHRC, and the CBAV were granted intervenor status to make legal submissions on the constitutional validity of the legislation and to lead affidavit evidence in support of those submissions. Affiants were required to be available at the hearing for cross-examination. Since the BCCLA had only requested standing to make legal submissions on the constitutional issues, its intervention was limited to its request.

On May 9, 1997, I was designated to hear the complaint. The oral hearing commenced on May 12 and ended on June 27. The parties agreed to make submissions on a further point in writing, concluding the hearing on July 18, 1997.

The Respondents dispute the complaint on the merits. They also challenge the constitutional validity of the legislation, both on the ground that it violates the *Charter* and on the basis that it exceeds the legislative competence of the province. At one point, it appeared that the Respondents were also asserting that, even if the substantive prohibition in issue was constitutionally valid, the law had been unconstitutionally administered in respect of the complaint against them. However, during the hearing, counsel for the Respondents expressly abandoned this argument. This abandonment was confirmed during closing arguments.

The Attorney General of British Columbia exercised his right to intervene as a party in this proceeding under s. 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. He supported the constitutional validity of the legislation on both *Charter* and division of powers grounds, but took no position on the merits of the complaint. The Deputy Chief Commissioner of the Commission exercised his right to intervene in this proceeding under s. 36 of the *Code*. He also supported the constitutional validity of the legislation and took no position on the merits. Two intervenors, the BCHRC and the CBAV, supported the constitutional validity of the legislation; the other two intervenors, the Press Council and the BCCLA, opposed it. All intervenors except the Press Council restricted their constitutional submissions to the *Charter*. The Press Council advanced both *Charter* and division of powers arguments.

II. Preliminary Issues

Two preliminary issues must be addressed. First, it is important to clarify the scope of the complaint and, in particular, whether I am considering s. 2 of the former *Act* or s. 7 of the *Code*. Second, I must determine whether I should decide the merits of the complaint before or after addressing the constitutional issues.

A. Scope of the Complaint

1. Subsection (1) or Subsection (1)(b)?

At the outset of the hearing, there was some discussion as to whether I was addressing the constitutional validity of s. 2(1) or 7(1) in its entirety, or whether the complaint (and therefore the constitutional challenge) was restricted to clause (b) of the sub-section. Counsel for the Attorney-General applied to amend the Complaint Information Form to clarify that the complaint was laid only under s. 2(1)(b) and not s. 2(1)(a) of the *Act*. She also requested that I amend the Respondents' Notice of Constitutional Question to the extent that it purported to give notice of a constitutional challenge to the whole of s. 2(1) and not merely to s. 2(1)(b). The Complainant took the position that it was proceeding with the complaint only in respect of clause (b) so that it was not necessary to amend the Complaint Information Form. I amended the Complaint Information Form so as to limit the scope of the complaint stated therein to s. 2(1)(b) of the *Act*; I declined to amend the Notice of Constitutional Question (see Appendix 1.3).

2. Section 2(1)(b) or Section 7(1)(b)?

A question arose as to whether I was dealing with s. 2(1)(b) of the *Act* or s. 7(1)(b) of the *Code*. Although the text of the provisions is identical, confusion arose from the outset of the hearing as to which section was in issue in the complaint. The matter was not merely a technicality because part of the Respondents' argument under s. 1 of the *Charter* rested upon the assertion that the substantive prohibition in issue could not be justified under s. 1 because the procedures in place for the investigation and adjudication of complaints infringed freedom of expression more than was minimally necessary. The significant differences between the administrative structures created by the *Act* and those created by the *Code* would necessarily affect this argument.

The parties differed as to which provision was in issue. The Complainant and Respondents both took the position that the relevant provision was s. 2(1)(b) of the *Act*, on the basis that the complaint was laid under that statute. While the *Code* could be referred to, and any determination of the constitutionality of s. 2(1)(b) would have obvious implications for s. 7(1)(b), it was s. 2(1)(b) that was in issue. Counsel for the Complainant suggested that addressing s. 7(1)(b) would raise difficult issues of retrospectivity but did not elaborate. The Attorney General and Deputy Chief Commissioner maintained that the relevant provision was s. 7(1)(b) of the *Code*. In fact, counsel for the Deputy Chief Commissioner relied on the inapplicability of the *Act* in her reply to the Respondents' argument that the overlapping of functions within the Council was not minimally impairing under s. 1 of the *Charter*. She said that constitutional issues relating to the *Act* were now moot and that the only issue before me was the constitutional validity of s. 7(1)(b) of the *Code*.

In resolving this issue, it is helpful to appreciate the legislative history which changed the *Act* into the *Code*, and re-numbered s. 2(1)(b). That section was first enacted as an amendment to the *Act* in 1993 by the *Human Rights Amendment Act, 1993*, S.B.C. 1993, c. 27. The *Human Rights Amendment Act, 1995*, S.B.C. 1995, c. 42 ("1995 Amendment") made extensive changes to the *Act*. It re-named the *Act* as the *Human Rights Code*, it added an express statement of purposes, and it dissolved the Council, replacing it with the Commission and Tribunal. However, it did *not* re-number the sections of the *Act*. Section 11 of the 1995 Amendment provided that it would only come into force by regulation of the Lieutenant Governor in Council. Two such regulations were passed (B.C. Reg. 87/96, April 4, 1996 and B.C. Reg. 256/96, Sept. 20, 1996), the second of which stipulated that the 1995 Amendment would come into force on January 1, 1997.

In 1996, the Chief Legislative Counsel made a general revision to the statutes of British Columbia, a process governed by the *Statute Revision Act*, R.S.B.C. 1996, c. 440. Section 2(1) of that statute grants the Chief Legislative Counsel the power to "alter the numbering and arrangement of Acts or provisions," to "rename an Act or portion of an Act", and to "include in the revision a supplement containing those Acts or provisions that, although enacted, have not been brought into

force, and indicate how they are to come into force." Pursuant to these powers, the Chief Legislative Counsel created the *Human Rights Code*, R.S.B.C. 1996, c. 210, ("Revised Code") which renumbered the sections of the statute so that s. 2(1)(b) of the *Act* became s. 7(1)(b) of the Revised Code. In anticipation of the coming into force of the 1995 Amendment, the *Human Rights Code (Supplement)*, R.S.B.C. 1996, c.210, ("Revised Code Supplement") was created.

The effect of this was that on January 1, 1997, the 1995 Amendment came into force. As stated above, it renamed the *Act* as a Code and replaced the Council with the Commission and Tribunal but left intact the old section numbers. However, on April 21, 1997, when the 1996 general revision of statutes came into force (pursuant to B.C. Reg. 92/97, March 13, 1997), it operated to repeal the Code created by the 1995 Amendment and replaced it with the Revised Code (containing new section numbers). Thus, the *Code* at the time of the hearing of this complaint and which continues in force, is the Revised Code (which I refer to as the "*Code*"), the relevant provision of which is s. 7(1)(b). Both the *Act* and the Code that was created by the 1995 Amendment, which was in force between January 1 and April 20, 1997, are now repealed.

Having clarified how s. 2(1)(b) came to be s. 7(1)(b), it remains to determine whether I am considering s. 2(1)(b) of the *Act* or s. 7(1)(b) of the *Code*. In my view, the answer to this question lies in the transitional provisions of the *Code*. Section 50(7) provides:

50(7) If, before January 1, 1997, the chair of the British Columbia Council of Human Rights had designated a member of that Council to receive submissions, in respect of a complaint, under section 14(1)(d) of the former Act, and that member

(a) had not, on December 31, 1996, received any submissions in respect of the complaint, the complaint is deemed to have been referred to the Human Rights Tribunal for a hearing under section 26(1)(c) of the present Act, and

(b) had, on December 31, 1996, received submissions in respect of the complaint but had not dismissed the complaint or made an order referred to in section 14(1)(d) of the former Act, that member

continues to have the same power to receive submissions, to dismiss the complaint or to make an order in respect of the complaint that the member had before January 1, 1997, and in relation to that complaint, sections 14, 15, 16, 17, 18 and 22 of the former Act remain in force despite their repeal.

This complaint falls within the scope of s. 50(7)(a). Mr Patch was the Council member designated to hear the complaint before January 1, 1997; however, the hearing had not commenced before that date. Thus, the complaint was deemed to have been referred to the Tribunal under s. 26(1)(c) of the *Code*. A complaint referred to the Tribunal under s. 26(1)(c) of the *Code* would necessarily be a complaint alleging discrimination under a substantive provision of the *Code*, because "complaint" is defined in s. 1 of the *Code* to mean a complaint filed under section 21, and s. 21(1) describes a complaint as an allegation "that a person has contravened this Code."

Moreover, the Tribunal was created by the *Code*, not the *Act*, and as a matter of general administrative law, a statutory tribunal's powers are limited by the statute creating it. Therefore, unless the *Code* expressly grants the Tribunal the power to apply the *Act*, its jurisdiction is limited to the *Code*. The fact that the *Code* does grant such power in very limited circumstances (see s. 50(7)(b)) indicates that in all other circumstances the Tribunal's jurisdiction is limited to the *Code*.

In my view, this interpretation of the effect of the *Code* does not create any problems of retrospectivity. It is consistent with s. 36(1) of the *Interpretation Act*, R.S.B.C. 1996, c. 238 and it also makes practical sense. The *Act*, together with the administrative structures it created, was repealed on January 1, 1997. Any determination of the constitutional sufficiency of those administrative structures as they affect the justifiability of s. 2(1)(b) under s. 1 of the *Charter* is now moot, except with respect to the actual administration of a complaint, which argument the Respondents have expressly abandoned. The effect of the transitional provisions of the *Code* is to deem that a complaint laid under a section of the *Act* is a complaint laid under the identical, but re-numbered provision of the *Code*. Therefore, the Respondents' constitutional challenge is to s. 7(1)(b) of the *Code*. They may question the sufficiency of the administrative structures which

govern the investigation and resolution of such complaints as part of their s. 1 argument, but the structures in issue are those created by the *Code* alone. (See also s. 8 of the *Statute Revision Act* which provides that if a revised provision has the same effect as the provision it replaces, the revision operates both prospectively and retrospectively.)

B. Whether Merits Must be Decided Before Considering Constitutional Issues

The parties and intervenors disagreed about the order in which I should consider the merits and the constitutional issues that were raised in the complaint. Counsel for the Attorney General emphatically asserted that I have jurisdiction to consider the constitutional validity of s. 7(1)(b) under the *Charter* only if I find that the complaint succeeds on its merits. Counsel for the Respondents argued that I ought to decide the *Charter* issue regardless of my finding on the merits. Counsel for the BCCLA submitted that the constitutional issue should be considered before any assessment of the merits of the complaint because, once a constitutional challenge to the legislation is asserted, it is inappropriate for the Tribunal to presume, as it implicitly must when considering the merits, that the legislation is constitutional.

The question I have to decide is whether I am bound to consider the constitutional and substantive issues in a particular order, or whether a particular order is preferable. It has been determined that I have jurisdiction to address both *Charter* and division of powers issues in this complaint: see Preliminary Decision of Tom Patch, Appendix 1.1; see also *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at 896.

On the one hand, if I were to consider the merits first, and I were to find that s. 7(1)(b) has not been violated on the facts of this case, consideration of the constitutional issue would be unnecessary. On the other hand, I have a general obligation to satisfy myself that I have jurisdiction to address the merits of a complaint before I proceed to do so (see M. Priest, "Charter Procedure in Administrative Cases: The Tribunal's Perspective" (1994), 7 C.J.A.L.P. 151 at 159-61).

I find the comments of the B.C. Court of Appeal in *Bennett v. British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d) 171 at 186 helpful. Essentially, the Court said that if a case can be disposed of without recourse to the *Charter*, it should be, unless the circumstances are such that even though recourse to the *Charter* is unnecessary, commentary on the constitutional issues may be helpful or illuminating. To these comments must be added, in the case of an administrative tribunal, an appreciation of the tone of caution about the desirability of administrative tribunals pronouncing on *Charter* issues which was implicit in the Supreme Court of Canada's recent decision in *Cooper*.

In the present case, because there is no established jurisprudence on the interpretation of s. 7(1)(b) of the *Code*, I believe it is preferable to consider the merits after an analysis of the meaning of the section in light of the *Charter*. I note that this approach was endorsed by the Supreme Court of Canada in *R. v. Butler*, [1992] 1 S.C.R. 452 at 483 where Sopinka J. said that the "lacuna in the interpretation of the legislation must, if possible, be filled before subjecting the legislation to *Charter* scrutiny." In my view, the balance of convenience favors addressing the *Charter* both as an interpretive guide and as a constitutional measure before turning to the merits, rather than considering how the *Charter* informs my reading of s. 7(1)(b), applying this interpretation to decide the merits of the complaint, and then returning to the *Charter* to decide whether the legislation is valid. This is not a case where the constitutional issues are in any way secondary, so that it is possible to put aside the Constitution when addressing the merits of the complaint. The constitutional issues have been treated by all parties and intervenors as the heart of the case and resolution of the merits is intertwined with them.

With respect to the division of powers argument, I am guided by the comments of Professor Hogg that, "in reviewing the validity of a law, the first question is whether the law is within the law-making power of the enacting body, and the second question is whether the law is consistent with the Charter of Rights." See Hogg, *Constitutional Law of Canada*, 3rd ed., (Scarborough: Carswell, 1992) at 373.

In these circumstances, the most logical order in which to deal with the issues is first to address the division of powers arguments and then to turn to the *Charter*. The most efficient way to address the *Charter* issues is first to consider the various factors that inform both the interpretation of the legislation in light of the *Charter* and the subsequent assessment of its validity. These factors will be considered under the heading "General Approach to the *Charter*". I will then interpret s. 7(1)(b) in light of the *Charter* jurisprudence, bearing in mind the fundamental presumption that, insofar as possible, laws should be interpreted in a manner consistent with the Constitution. Once interpreted, the section can then be assessed against the *Charter*. Finally, the merits of the complaint can be determined. It is true that a finding that the section is unconstitutional makes it unnecessary to consider whether the complaint would have succeeded on the merits, just as a finding that the complaint is not justified would make it unnecessary to consider either of the constitutional issues. However, given the extensive arguments made before me and the deference to be accorded to my findings of fact (albeit not my findings of law) by a reviewing court, I believe that it is appropriate for me to consider all of the issues that have been argued before me in the event that I am wrong on one or more of them.

III. Relevant Legislation

It is convenient to reproduce at the outset the relevant provisions of the *Code* and of the Constitution.

Section 7(1)(b) of the *Code* provides:

Discriminatory publication

7(1) A person must not publish, issue or display or cause to be published, issued or displayed any statement, publication, notice, sign, symbol, emblem or other representation that

...

(b) is likely to expose a person or a group or class of persons to hatred or contempt

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or that group or class of persons.

The relevant portions of sections 91 and 92 of the *Constitution Act, 1867* (U.K.) 30 & 31 Vict., c. 3 are:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, -

...

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say, -

...

13. Property and Civil Rights in the Province

...

15. The Imposition of Punishment by Fine, Penalty or Imprisonment for enforcing any Law of the Province made in relation to any matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

Sections 1 and 2 of the *Charter* provide:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

...

IV. Division of Powers Issues

The Respondents and the Press Council challenge the validity of s. 7(1)(b) on the basis that it is *ultra vires* the Province of British Columbia. The Respondents argue that it trenches on federal criminal law jurisdiction under s. 91(27) of the *Constitution Act, 1867*. In the course of its closing submissions at the hearing, it became apparent that the Press Council challenged the *vires* of the section on a second ground, namely, that it intruded into what the Press Council asserted was federal jurisdiction over "speech" which, in the context of this hearing, was used synonymously with "expression".

Counsel for the Attorney General objected to this second ground of challenge on the basis that it fell outside the scope of the case as defined by the parties and had not been the subject of the required notice under the *Constitutional Question Act*. Counsel for the Respondents then sought to amend his Notice of Constitutional Question to add the issue and to adopt the Press Council's arguments as his own. Having concluded that the Attorney General should have been given notice of this issue, I granted the Respondents' request to amend the Notice of Constitutional Question.

I considered that the issue was an important one and any prejudice to the parties could be eliminated by an adjournment which would allow time for them to prepare their submissions on the issue. The parties agreed that the new issue could be argued by way of written submissions after the conclusion of the oral portion of the hearing. I granted the time requested by counsel for the Attorney General to prepare her submissions and set an appropriate schedule for responses and replies by others.

In my view, the division of powers arguments, particularly as they relate to provincial legislative jurisdiction over speech, are really an indirect and rather technical way of addressing matters that are much more clearly and openly dealt with under the *Charter*. Judicial doctrines within division of powers analysis to restrict legislative jurisdiction over speech were developed well before the *Charter* expressly limited the power of any level of government to restrict freedom of expression beyond what is reasonable and demonstrably justified in a free and democratic society. Thus, although at least some of the pre-*Charter* doctrines retain their vitality today, restrictions on freedom of expression are essentially *Charter* issues and are most directly decided through the application of *Charter* doctrines.

Applying division of powers analysis, I must consider whether s. 7(1)(b) falls outside provincial jurisdiction on the basis that it trenches on the federal criminal law power or that it trenches on an asserted exclusive federal jurisdiction over speech. In approaching these issues, I will first consider whether there is any plausible characterization of the impugned law in relation to a valid provincial head of power. If none can be found, the law is clearly invalid. However, if it can be characterized as falling under a provincial head of power, it is still necessary to consider whether it intrudes on a federal head of power or only "incidentally affects" a matter within federal jurisdiction. If it intrudes on federal jurisdiction in its pith and substance, it will be constitutionally invalid.

A. Provincial Jurisdiction over Human Rights

The most direct consideration of the source of a province's jurisdiction to enact human rights laws is found in Estey J.'s judgment for the majority of the Court in *Scowby v. Glendenning*, [1986] 2 S.C.R. 226. The case concerned a complaint laid under s. 7 of the *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24, as amended, against two R.C.M.P. officers respecting their conduct in investigating an offense under the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, as amended. The section created a right to be free from arbitrary arrest or detention and a right to the determination of the legality of any detention. The officers challenged the constitutional validity of s. 7 on the basis that it trenched on federal jurisdiction over criminal law.

In approaching the question of characterization, Estey J. made the following comments (*Scowby*, *supra*, at 233-4):

The province may, under s. 92(15), create an offense to enforce or support a constitutionally valid provincial law or program. "Human rights" without more is itself not such a free-standing program in the sense that not all such rights, and not all means by which such rights may be protected, fall in pith and substance within one of the heads of power in s. 92. Rather, provincial legislation protecting aspects of human rights may find constitutional validity only to the extent that it is, outside of its association with human dignity or liberty, independently valid under s. 92.

Let it be said at once that one does not approach a provincial human rights code on the basis that it is constitutionally presumptively suspect. The great bulk of the protections granted by such codes would appear to be beyond challenge as being legislation in relation to property and civil rights, or to matters of merely local and private nature. They deal, for example, with questions of discrimination in housing and employment, and equal access to goods and services. These legislative provisions are valid not because they affirm interests such as liberty, or human dignity, but because the activities legislated, that is for example housing, employment, and education, are themselves legitimate areas of provincial concern under ss. 92 and 93. Here, however, we are asked to rule on the validity of a provision which does not fit into this category. Section 7 of the *Saskatchewan Code* deals with arbitrary arrest. To the extent that that subject is in pith and substance a matter falling exclusively within federal legislative competence, s. 7 must be found to be *ultra vires* the province.

In my view, therefore, it is not sufficient in disposing of this appeal to point to the fact that the Saskatchewan Code provisions are, as expressed in s. 3 of the Act, aimed in unison at the common targets of promoting "recognition of the inherent dignity and the equal inalienable rights of all members of the human family", and furthering the public policies against discrimination. The preoccupation of the Code as a whole with fostering civil liberties does not compel the conclusion that all the provisions of the Code are within provincial competence under s. 92(13), "property and civil rights". In the division of legislative powers, "civil rights" is neither synonymous with nor necessarily inclusive of matters commonly thought of as "civil rights issues".

Further, he said (at 236):

In each case, the essential question is whether provincial legislation is valid as in relation to property and civil rights or some other head of s. 92, or impermissibly deals with matters in relation to a subject over which Parliament has been given exclusive legislative jurisdiction.

In *Scowby*, Estey J. was reviewing the validity of a section of a provincial human rights code that created a right to be free from arbitrary arrest or detention and a right to "an immediate judicial determination" of the legality of any detention. Although he found that the provision trenched on federal criminal jurisdiction insofar as it created *habeus corpus* type rights for arrests and detentions made under the *Criminal Code*, Estey J. found that the section was within provincial jurisdiction insofar as it created rights respecting arrests and detentions under otherwise valid provincial laws (*Scowby*, *supra*, at 242). He also indicated that it would have been competent to the province to regulate the *civil* aspects of unlawful arrest (whether under a provincial law or the *Criminal Code*).

In the case before me, s. 7 of the *Code* is entitled "Discriminatory publication". It, like the other sections found in Part 1 of the *Code*, defines and prohibits discriminatory practices in various contexts including employment, accommodation, and the provision of services. Most of these prohibitions fall within Estey J.'s description of what are unquestionably areas of provincial concern and comprise what is generally regarded as the "core" of traditional protection of human

rights. Section 7, however, prohibits discrimination in "any statement, publication, notice, sign, symbol, emblem or other representation" which, in s. 7(1)(b), is defined as that which is likely to expose a person or group to "hatred or contempt". The section therefore regulates discrimination in the context of published (and, in that sense, public) expression, while other sections address discrimination in other contexts, such as employment or accommodation.

Speech (or expression) itself is not explicitly mentioned as a subject matter under ss. 91 or 92; neither is accommodation or employment. However, the regulation of speech through the common law tort of defamation falls within provincial jurisdiction under s. 92(13), as part of the general body of tort law, which concerns the legal rights of persons against each other: Hogg, *supra*, at 958. The province is legislatively competent to modify the substance or procedure for enforcing common law torts, as for example, in the *Libel and Slander Act*, R.S.B.C. 1996, c. 263. By analogy, the fact that a province chooses to regulate some speech by means of an administrative process rather than through the civil litigation process does not, without more, deprive the province of its jurisdiction over speech under s. 92(13). The enforcement may occur in administrative rather than civil form, but generally, as long as it is civil rights that are being enforced, the matter falls within provincial jurisdiction.

Therefore, s. 7(1)(b) is constitutionally valid unless it can be shown that the nature of the regulation in this case is not that of a "civil right" as that term is used in s. 92(13), but is, in pith and substance, more a prohibition in the nature of criminal law or that it intrudes upon some exclusive federal jurisdiction over certain aspects of speech.

B. Federal Jurisdiction over Criminal Law

The test for determining what is criminal law within the scope of s. 91(27) is well-established. It was once a purely formal test: is there a prohibition with a penal consequence?: *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310 at 324.

Subsequently, courts determined that this definition was too broad, and added the requirement that a legitimate public purpose must underlie the prohibition: *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 at 49 (S.C.C.); aff'd [1951] A.C. 179 (P.C.); see also *Scowby*, *supra*, at 236-8; *RJR MacDonald v. Canada (Attorney-General)*, [1995] 3 S.C.R. 199 at 240-1, *per La Forest J.*

Applying this test to s. 7(1)(b) of the *Code*, I find that it does not trench upon the federal criminal law power. Quite apart from the question of public purpose, it lacks the requisite formal elements.

There is no explicit penalty for contravening s. 7(1)(b) or any of the other prohibited discriminatory practices in the *Code*. Section 48 of the *Code* states expressly that s. 5 of the *Offence Act*, R.S.B.C. 1996, c. 338 does *not* apply to the *Code*. Section 5 of the *Offence Act* provides that "[a] person who contravenes an enactment by doing an act that it forbids ... commits an offence against the enactment." Section 4 of the *Offence Act* creates a general penalty of a fine or imprisonment for "persons convicted of an offence" if there is no specific provision in the enactment. Since these sections do not apply to the *Code*, there is no penalty which might intrude on the federal criminal law power, unless one or more of the remedies which are authorized by the *Code* can be characterized as a colorable attempt to disguise a penalty as a non-criminal remedy.

The remedies which may flow from a breach of any of the substantive prohibitions in Part 1 of the *Code* are set out in sections 37-39. If a complaint is found justified, the Tribunal member is required to order the person who committed the contravention to cease the contravention and refrain from committing the same or a similar contravention (s. 37(2)(a)). In addition, he or she may make a declaratory order that the conduct complained of is discrimination (s. 37(2)(b)), and/or may order the person who contravened the *Code* to take steps to ameliorate the effects of the discrimination or to implement a special ameliorative program (s. 37(2)(c)). Further, if the person discriminated against is a party to the complaint or is someone on whose behalf the complaint was filed, the Tribunal member may order that any right, opportunity or privilege that

was denied contrary to the *Code* be made available to that person; may compensate the person for lost wages or salary, or for expenses incurred; and/or may require payment of an amount to compensate for "injury to dignity, feelings and self-respect or to any of them" (s. 37(2)(d)). Section 37(4) empowers the Tribunal member to award costs against a party that has engaged in "improper conduct during the course of the investigation or the hearing of the complaint." Section 38 provides for the modification of orders; s. 39 stipulates that orders may be filed in the Supreme Court and, if so filed, proceedings may be taken on them as if they were orders of the Supreme Court.

Counsel for the Respondents argued that the absence of any legislative cap on the amount that can be awarded under s. 37(2)(d) coupled with the fact that a contravention of s. 7(1)(b) is established if it is shown that the publication is "likely" to expose person(s) to hatred or contempt shows that what looks like a compensatory award is actually "punitive" or penal. I disagree. In general, human rights legislation and the remedies it provides have been characterized as remedial, not punitive: *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at 91-2.

In the case of the *Code*, s. 37(2)(d) is explicitly compensatory. The absence of a requirement of proof that the complainant was actually exposed to hatred or contempt in the definition of the prohibited conduct in s. 7(1)(b) does not affect the characterization of the remedy in s. 37(2)(d). The monetary remedies in ss. 37(2)(d) (ii) and (iii) are expressly stated to be compensatory in nature. The lack of an explicit legislative cap on damages could only be argued to convert these compensatory awards into punitive ones if it were assumed that Tribunal members would, as a general practice, disregard the clear words of the statute and make orders that could not be justified as compensation. Such an assumption is unwarranted. Even if a Tribunal member were to make an order under one of these sections that was punitive rather than compensatory because of its excessive amount, it would not alter the characterization of the law for constitutional purposes; the award would simply be overturned on judicial review: see *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 at 560-1 *per* Wilson J.

Moreover, the courts have held that, even in a case in which an administrative tribunal is given the explicit power to levy a fine (which is closer to a criminal penalty than is a compensatory award), the absence of a legislative cap on the maximum fine that may be awarded does not necessarily make it a penalty for the purposes of division of powers analysis: *Belhumeur v. Barreau du Québec (Comité de discipline)* (1988), 54 D.L.R. (4th) 105 (Que. C.A.). The monetary awards which may be ordered under s. 37(2)(d) are not fines: they are compensation paid to the victims of discrimination. They are private, not public in nature.

Therefore, I conclude that the prohibition in s. 7(1)(b) is not coupled with a penalty; as a result the legislation does not trench upon 91(27) on this basis.

Counsel for the Respondents also argued that certain features of the administrative process for the enforcement of the prohibition in s. 7(1)(b) make it more analogous to a criminal prosecution than to a civil proceeding. He points to the fact that the Deputy Chief Commissioner, who is a public official, may initiate a proceeding by filing a complaint himself (s. 21(2)) and to the absence of any mechanism for compelling discovery by the Tribunal prior to a hearing, which he says is fatal to characterizing the procedures under the *Code* as civil.

This latter submission misconceives the allocation of jurisdiction in ss. 91 and 92 of the *Constitution Act, 1867*. It is true that s. 91(27) confers exclusive jurisdiction over criminal law and procedure upon the federal Parliament. However, this does not mean that the provinces' jurisdiction is limited to civil procedure in the sense of civil litigation. Sections 92(14) and 92(15) clearly contemplate that the provinces have jurisdiction over civil and administrative processes for the enforcement of statutory prohibitions, including offenses, within provincial jurisdiction. The proposition that a discovery mechanism is, effectively, a constitutional precondition for provincial power to create an administrative regulatory regime, is entirely novel and unsupported in the jurisprudence.

There is more merit to the submission that the power granted to the Deputy Chief Commissioner to initiate a complaint gives the process a more public character than that normally seen in a process for the enforcement of private rights. This would be of particular concern if the Deputy Chief Commissioner filed a complaint and was seeking a monetary remedy of some kind. However, that is not this case and it is not necessary for me to deal with that hypothetical situation here. I also note that the logical result, if such a constitutional challenge were successful, would be to find s. 21(2) constitutionally invalid; the constitutional characterization of s. 7(1)(b) would not be affected.

The Respondents also argued that s. 7(1)(b) has a criminal public purpose. However, in light of my finding that the impugned provision lacks the formal elements which might bring it within the scope of s. 91(27), there is no need to consider these arguments.

I conclude that s. 7(1)(b) is not *ultra vires* the province by intruding into the federal criminal law power.

C. Federal Jurisdiction over Speech

The Press Council, whose submissions are adopted by the Respondents, also challenges the *vires* of s. 7(1)(b) on the basis that it unconstitutionally intrudes into what they assert is an exclusive federal jurisdiction over speech. Two alternative sources of federal jurisdiction over speech are advanced. First, it is asserted that "speech about" any and all of the subject matters listed in s. 91 of the *Constitution Act, 1867* falls within exclusive federal jurisdiction so that s. 7(1)(b) is *ultra vires* to the extent that it would encompass topics beyond those listed in ss. 92 and 93. In his oral submissions, counsel for the Press Council argued that the speech in the present complaint is about "Hollywood", a topic that does not lie within British Columbia and is therefore beyond provincial jurisdiction.

The proposition that jurisdiction to regulate speech is divided in the manner suggested has no support whatsoever in the jurisprudence. Speech is a matter of divided jurisdiction but the division concerns the nature and purpose of the regulation (that is, its "aspect"), not the topic of the particular speech in issue: *Attorney-General (Canada) and Dupond v. Montreal*, [1978] 2 S.C.R. 770 at 796-7. (See also *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662 at 688 where the Court held that provincial legislative authority to restrict the public viewing of films was not diminished in the case of films imported from another country.) Regulation of speech about "Indians", who are assigned to exclusive federal jurisdiction by s. 91(24), for example, is clearly not beyond the competence of the province. To suggest otherwise would mean that an individual who was defamed by speech that focused on his or her aboriginal status could not seek a civil remedy under the *Libel and Slander Act*. Similarly, provincial regulation of advertising could not encompass advertising concerning the postal service (assigned to federal jurisdiction by s. 91(5)). Such an approach to jurisdiction over speech is inconsistent with the pith and substance doctrine which underlies division of powers analysis and enables a government to enact laws with a substantial impact on matters outside its jurisdiction as long as the law itself is generally found to be "in relation to" one of the heads of power assigned to that level of government. (See generally Hogg, *supra*, at 378-9 and the numerous authorities cited in the accompanying notes.)

Second, the Press Council and Respondents submit that the jurisdiction to regulate "political and social speech" is exclusively federal. Although the Press Council failed to develop the argument, this submission raises a difficult issue concerning the status of pre-*Charter* judicial doctrines developed in the context of legislative efforts to prohibit certain kinds of political speech. Put at its highest, those challenging the validity of s. 7(1)(b) might argue that the section is beyond provincial jurisdiction because the "hate speech" that it prohibits falls within a category of "political speech" that is incompetent to the provinces.

Two limits on provincial jurisdiction over political speech are considered in the federalism jurisprudence. They are federal criminal power (s. 91(27) of the *Constitution Act, 1867*) and the "implied bill of rights" doctrine. It is necessary to consider each in turn because each would

impose different kinds of restrictions on the provincial power to regulate speech that is otherwise encompassed by s. 93(13).

The view that the federal criminal power in s. 91(27) includes an exclusive jurisdiction over certain kinds of speech was most strongly expressed in *Switzman v. Elbling*, [1957] S.C.R. 285. That case concerned Quebec's "padlock law" which prohibited using a house to propagate communism. Eight of the nine judges who heard the case concluded that the legislation was *ultra vires* the province. Five did so on the basis that the statute created a crime of propagating communism. That is, the law in question was found to satisfy both the formal and the substantive elements of the definition of criminal law. However Rand, Kellock and Abbott JJ. would have held that the provinces (and perhaps Parliament as well) were not competent to regulate such political speech. (See also *Scowby*.)

I have also found some suggestion in the academic literature that provincial jurisdiction to restrict hateful or discriminatory speech in human rights legislation is limited: Tarnopolsky, *Discrimination and the Law*, rev. ed., (Toronto: Carswell, 1994) at 10-14 - 20. In particular, Professor Tarnopolsky (as he then was) says that the province cannot go beyond prohibiting discriminatory speech in notices, signs, symbols and similar representations so as to prohibit discriminatory opinions in newspaper articles or editorials. It is not clear, however, whether Professor Tarnopolsky is suggesting that the province cannot restrict the discriminatory content of newspapers in any way, or that it simply cannot do so by means of creating a quasi-criminal offense, that is, a type of restriction which is clothed in criminal law form. The cases Professor Tarnopolsky relies upon suggest the latter conclusion. The most relevant of these is the decision of the Saskatchewan Court of Appeal in *Saskatchewan (Human Rights Commission) v. Engineering Students' Society* (1989), 10 C.H.R.R. D/5636. That case concerned a complaint laid under s. 14(1) of the *Saskatchewan Human Rights Code*, which prohibited, among other things, the publication in a newspaper of any "notice, sign, symbol, emblem or other representation ... which exposes, or tends to expose to hatred, ridicules, belittles, or otherwise affronts the dignity of any person ... because of ... sex" or various other grounds. The complaint was laid against an

entire issue of a student tabloid. Applying principles of constitutional law and statutory construction together, the majority of the court found that "representation" could not be construed so as to include the articles or editorials in newspapers, which would be "'statements' rather than representations" (*Engineering Students' Society, supra*, at D/5644-5). Cameron J.A. implied that it would be beyond provincial competence for the section to extend to such statements (and that is certainly how Professor Tarnopolsky read the judgment). However, he expressly stated that he was not considering "that aspect of the section that deals with "hate" material" (*Engineering Students' Society, supra*, at D/ 5644), and he made it very clear that the Saskatchewan Code attaches criminal penalties to violations of s. 14. Thus, the provision in issue was quasi-criminal.

As I have already found that s. 7(1)(b) of the *Code* does not possess the formal elements of a criminal law, the fact that the content of the speech it encompasses may fall within federal jurisdiction if regulated through a quasi-criminal mechanism does not affect its validity. I also note that the scope of federal criminal law power in so far as it restricts provincial competence to create human rights offenses for discriminatory speech is not well-settled. Vancise J.A.'s dissent in the *Engineering Students' Society* case suggests that the province has some jurisdiction to legislate in this way.

In any event, even if the province could not have validly enacted s. 7(1)(b) as a provincial offense penalized by way of fine or imprisonment, it did not do so in the *Code*. I conclude, therefore, that the restriction in s. 7(1)(b) does not intrude on any federal jurisdiction over speech under s. 91(27).

The implied bill of rights doctrine asserts that certain very fundamental rights, freedom of political speech in particular, cannot be abridged by either level of government. Although it has never been relied on as the deciding principle by a majority of the Supreme Court of Canada, it has been the subject of dicta on various occasions. Its origin is usually attributed to Duff C.J. (Davis J. concurring) in *Reference re Alberta Statutes*, [1938] S.C.R. 100 at 133-5; aff'd [1939] A.C. 117, (*sub nom. Alberta (Attorney General) v. Canada (Attorney General)*) who, in holding that

provinces cannot require newspapers to grant the government a right of reply to criticism of government policies, emphasized the fundamental importance of public discussion to democracy:

The [*Constitution Act, 1867*] contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. ...

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James v. Commonwealth [of Australia]*, [1936] A.C. 578 at 627], "freedom governed by law." ...

Some degree of regulation of newspapers everybody would concede to the provinces. Indeed, there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of *The British North America Act* and the statutes of the Dominion of Canada.

In interpreting the scope of this right of public discussion that is beyond provincial jurisdiction, it is important to keep in mind that Duff C.J. expressly refrained from expressing any opinion as to whether the legislated right of reply in the bill before him would substantially interfere with the working of the legislature (at 135). Cannon J. made similar remarks in his concurring judgment; however, the other three judges did not comment on this issue.

The remarks in *Reference re Alberta Statutes* were quoted with approval some years later in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299 by Rand, Kellock and Locke JJ. in their various judgments but, again, these comments were not the *ratio* of the Court's decision. In that case, a Quebec by-law prohibiting the distribution of literature on streets was held *ultra vires* the province. In *Switzman*, the Court held that a province could not prohibit the use of houses to

propagate communism because the pith and substance of the law was to criminally prohibit certain political ideas. However, as I have mentioned, only three of the eight majority judges described the matter as exceeding provincial competence because it suppressed political speech; the other five classified the legislative prohibition in issue as a crime within the meaning of s. 91(27).

Much of the controversy in these cases, and in the academic literature, centered around whether jurisdiction to restrict these kinds of political speech was beyond the competence of the federal Parliament, as well as the provincial legislatures. The issue was a difficult one, because if neither level of government were competent to legislate in respect of this matter, the fundamental principle of the exhaustive distribution of legislative powers would be compromised. (See generally, *Oil, Chemical and Atomic Workers v. Imperial Oil*, [1963] S.C.R. 584 at 600 *per* Abbott J.; *Dupond*, *supra*, at 796 *per* Beetz J.: "[none of the fundamental freedoms] is so enshrined in the Constitution as to be beyond the reach of competent legislation." See also F.R. Scott, *Civil Liberties and Canadian Federalism* (Toronto: University of Toronto Press, 1959) at 18-21; Laskin, "An Inquiry into the Diefenbaker Bill of Rights" (1959), 37 Can. Bar Rev. 77 at 103.)

The status of the doctrine after the entrenchment of the *Charter* was unclear until the Supreme Court of Canada's decision in *O.P.S.E.U. v. Ontario*, [1987] 2 S.C.R. 2. That case concerned a constitutional challenge to provisions of Ontario's *Public Service Act* which prohibited Crown employees from engaging in certain political activities unless they took a leave of absence from their employment. Writing for a majority of the court, Beetz J. addressed the appellants' submission that the province could not derogate from the implicit right of free political discussion and activity (*O.P.S.E.U.*, *supra*, at 57):

There is no doubt in my mind that the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff C.J. in *Reference re Alberta Statutes* at p. 133, "such institutions derive their efficacy from the free public discussions of affairs...." and, in those of Abbott J. in *Switzman v. Elbling*, at p. 328 [S.C.R.],

neither a provincial legislature nor Parliament itself can "abrogate this right of discussion and debate". Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure.

...

I should perhaps add that issues like the last will in the future ordinarily arise for consideration in relation to the political rights guaranteed under the *Canadian Charter of Rights and Freedoms*, which, of course, gives broader protection to these rights and freedoms than is called for by the structural demands of the Constitution. However, it remains true that, quite apart from *Charter* considerations, the legislative bodies of this country must conform to these basic structural imperatives and can in no way override them. The present legislation does not go so far as to infringe upon the essential structure of free Parliamentary institutions.

(See also *O.P.S.E.U.*, *supra*, 24-6 *per* Dickson C.J.).

It seems clear, therefore, that there is authority to the effect that the province cannot legislate to curtail certain kinds of political speech. However, in relying on this doctrine, care must be taken to define the scope of protection it affords. In particular, it is important to note that, while he recognized some degree of protection for political speech under the *Constitution Act, 1867*, in the passage quoted above, Beetz J. stated that the scope of protection for speech under this doctrine is narrower than that afforded to freedom of expression under s. 2(b) of the *Charter*.

The speech that is protected from legislative restriction under the *Constitution Act, 1867* is speech that is "political" in the sense that it relates to the "essential structure of free Parliamentary institutions" so that restricting it would "substantially interfere" with the working of democracy. Can it be said that the restriction on the "hate speech" in s. 7(1)(b) substantially interferes with the working of democracy?

In answering this question, it is worth bearing in mind that much more direct and draconian legislative restrictions on political speech have not been found to run afoul of this constitutional requirement. In *Reference re Alberta Statutes*, as noted above, Duff C.J. did not find that a

legislated right of reply in newspapers for government to answer criticisms of its policies intruded into this domain of core political speech.

Hate speech has been categorized as political expression for the purposes of *Charter* analysis: *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 764. But in the course of recognizing hate speech as political expression for Charter purposes, Dickson C.J. also described it as "inimical" to the workings of democracy:

...I recognize that hate propaganda is expression of a type which would generally be categorized as "political", thus putatively placing it at the very heart of the principle extolling freedom of expression as vital to the democratic process. Nonetheless, expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics. This brand of activity is thus wholly inimical to the democratic aspirations of the free expression guarantee.

If hate speech is only tenuously related to the democratic rationale underlying s. 2(b) of the *Charter*, as described in *Keegstra*, it cannot be maintained that it falls within the category of speech removed from provincial jurisdiction by the implied bill of rights doctrine because it is so essential to the functioning of Parliamentary institutions that restricting it would substantially interfere with the workings of those institutions. Even if s. 7(1)(b) did affect some speech that could be so described, it is well-established that provincial legislation may validly impinge on matters outside provincial jurisdiction as long as it is *intra vires* the province in its pith and substance: for example, see the unanimous judgment of the Supreme Court of Canada in *G.M. v. City National Leasing*, [1989] 1 S.C.R. 641 at 669-70.

Therefore, I conclude that, to the extent that s. 7(1)(b) prohibits "political" speech by restricting expression that is likely to expose a person or group to hatred or contempt, it does not exceed provincial legislative jurisdiction either by trenching on federal jurisdiction in s. 91(27) or under the implied bill of rights doctrine. Since the argument that s. 7(1)(b) creates a criminal law within

the meaning of s. 91(27) also fails, I conclude that the enactment of the provision is a constitutionally valid exercise of provincial legislative jurisdiction under the *Constitution Act, 1867*.

V. *Charter Issues*

The *Charter* issues raised in this complaint evoke fundamental political, moral and social debates about the relative value of freedom of expression in a democracy. Are our collective aspirations for a tolerant, equal and diverse society best achieved through "unlimited" freedom of expression? If some expression should be limited, who should impose the restrictions and by what means can the regulators be held accountable? What kinds of restrictions are justifiable?

These are complex and fascinating questions, which have been extensively canvassed both historically and currently in a wide variety of writings. Indeed, counsel submitted to me an eclectic sampling of this vast literature, both as evidence and as authorities. They range from the popular (books, newspaper and Internet articles) to the academic (philosophical, political, historical and legal publications). They include statutes from and descriptions of the legal regimes in other jurisdictions, both past and present.

Interesting as this material is, I am not called upon to consider the wisdom of s. 7(1)(b) of the *Code* in a political, philosophical or social sense. I am required to determine its constitutional validity. This question is obviously not unrelated to the larger debate; however, there are constraints upon me in my capacity as a decision-maker that restrict the way in which I may consider the larger issues. For example, although I was urged in some of the submissions to regard the judgments of the majority of the Supreme Court of Canada in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 and *Keegstra* as wrongly decided, this course is not open to me. In arriving at a decision on the constitutionality of s. 7(1)(b), I must primarily apply the considerable body of domestic *Charter* jurisprudence. The evolution of this jurisprudence in

the Supreme Court of Canada, particularly in its early stages, was explicitly informed by philosophical and other discourses, as well as by consideration of the approaches to freedom of expression taken by other democratic states and international documents. (See generally: *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Keegstra*.) Thus, to the extent that these literatures are incorporated in the jurisprudence, which is my primary resource in interpreting and applying the *Charter* to the present complaint, they will play a role in my consideration of the issues. However, it is not open to me to take up the invitation of some of the intervenors to disregard the jurisprudence and to rely instead directly on the philosophical, political and other literatures to arrive at a resolution of the present case.

It is also important to be clear about what I am called upon to decide in this case. There is no question that s. 7(1)(b) limits freedom of expression. The Attorney General explicitly conceded that s. 2(b) of the *Charter* was infringed; none of the other parties or intervenors took a different view. The *Charter* issues that I have to consider, therefore, are limited first, to understanding the nature of the limit on freedom of expression contained in s. 7(1)(b), that is, interpreting the section in light of the *Charter*; and second, to determining whether s. 7(1)(b) constitutes a reasonable limit on freedom of expression within the meaning of s. 1 of the *Charter*, that is, assessing the section against the *Charter*. Before embarking on these two enquiries, it is useful to set out some general principles of *Charter* analysis.

A. General Approach to the Charter

Any consideration of the *Charter* issues before me must start with an appreciation that an infringement of freedom of expression in s. 2(b) of the *Charter* was conceded. This fact colours both the interpretation and the assessment of the legislation. With respect to interpretation, it means that the scope of s. 7(1)(b) must be read against a background in which the provision is constitutionally suspect (although it may ultimately prove to be justifiable under s. 1 of the

Charter). With respect to assessment, it focuses the analysis from the outset on s. 1. Although the infringement itself is not in issue, consideration of the nature and extent of the infringement helps establish the context in which the legislation must be interpreted and its constitutional validity assessed under s. 1. I will address the nature and extent of the infringement following my discussion of the principles underlying *Charter* analysis in this case.

Two general principles guide my approach to the *Charter* and inform both the interpretation of the legislation and its assessment under the *Charter*. The first concerns the role of the *Charter* in relation to remedial legislation. The second concerns the balancing of competing values and the importance of context in section 1.

1. The *Charter* and Remedial Legislation

Although the *Charter* only applies to limit government action, the Supreme Court of Canada has recognized that government may promote the rights and freedoms contained in the *Charter* just as much as it may trespass against them. Government is not only a threat to individual liberties, it may also be the most powerful ally of the vulnerable in making those liberties effective and real. In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 779, Chief Justice Dickson put it this way:

In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

(See also *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1051-2.)

In her dissenting judgment in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 353-6, Madam Justice Wilson related her concern about the dual role of government as protector and transgressor of individual rights to her analysis of the scope of the *Charter*. She said:

It is not simply that the accumulation of social, political and legal power in private entities makes possible the commission of human rights violations, it is also that recent evidence tends to suggest that it is within the realm of the "private" that the vast bulk of these injustices tend to occur.

...

It is, in my view, untenable to suggest that freedom is co-extensive with the absence of government. Experience shows the contrary, that freedom has often required the intervention and protection of government against private action.

Although he took a different view of the reach of s. 32 of the *Charter* in his majority judgment in *McKinney*, *supra*, at 262, La Forest J. also recognized that government can act affirmatively to protect individual rights, referring to the enactment of human rights legislation as an important example.

Human rights legislation is a paradigmatic example of the type of governmental action that is, in general, consonant with the *Charter's* guarantees rather than antagonistic to them. In particular, the guarantee of equality in s. 15 of the *Charter* has been recognized as embracing our society's commitment to human dignity and as remedial in its purpose: *R. v. Swain*, [1991] 1 S.C.R. 933 at 992; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at 272. The rights to freedom of religion in s. 2(a) of the *Charter*, and the value placed on cultural diversity in s. 27, together with the rights in s. 15, closely accord with the purposes of the *Code* which are set out in s. 3:

- (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia,
- (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights,
- (c) to prevent discrimination prohibited by this Code,
- (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code,
- (e) to provide a means of redress for those persons who are discriminated against contrary to this Code,
- (f) to monitor progress in achieving equality in British Columbia,

(g) to create mechanisms for providing the information, education and advice necessary to achieve the purposes set out in paragraphs (a) to (f).

(See also: *Robichaud, supra*, at 89-90; *Taylor, supra*, at 916-7.)

The complementary relationship between human rights statutes and the *Charter* distinguishes such legislation from other regulatory mechanisms, for example, the criminal law, where government is traditionally understood as acting to restrict individual rights and liberties for the sake of the greater social good. The special role of human rights legislation in promoting individual rights and freedoms has been repeatedly recognized. In *Ontario Human Rights Commission v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 at 547 Justice McIntyre, writing the unanimous judgment of the Court, said:

Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination.

(See also *I.C.B.C. v. Heerspink*, [1982] 2 S.C.R. 146 at 157-8; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150 at 156; *Canadian National Railway Co. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at 1136.)

This certainly does not immunize any particular provision in a human rights statute from *Charter* review. However, it does suggest that decision-makers should take particular care when interpreting a human rights provision in light of the *Charter* to give the provision its fullest possible effect short of overshooting constitutional limits. When assessing a human rights provision against the *Charter*, it means that the justifiability of the infringement must be measured in a context where significant weight is placed on the importance of the objectives of the legislation. Not only will this affect the first branch of the s. 1 assessment, but it will form part of the context for the whole of the s. 1 analysis. In *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at 875, La Forest J., writing for the whole Court, made a similar point in relation to the role of human rights tribunals:

This Court should proceed under s. 1 with recognition of the sensitivity of human rights tribunals in this area, and permit such recognition to inform this Court's determination of what constitutes a justifiable infringement of the *Charter*.

2. Context and Balancing under Section 1

The second general principle of *Charter* analysis highlights the importance of context to the balancing of values in the s. 1 analysis. The courts have recognized that *Charter* values may conflict and, when they do, that the correct approach is to balance them in the application of the s.1 test rather than to allow the scope of one right to narrow the scope of another: *Ford, supra*, at 766; *Keegstra, supra*, at 726, 734 *per* Dickson C.J.; at 835, 837 *per* McLachlin J. This means that an infringement of freedom of expression, for example, will be demonstrated regardless of how important a particular restriction of expression is in ensuring the effectiveness of other *Charter* rights (for example, equality or freedom of religion) or even the same *Charter* right for others. It means that, in such cases, the primary focus will be on balancing the constitutional values furthered by the legislative provision against the right or rights infringed at the s. 1 stage of analysis. Guidance is provided by the approach to s. 1 set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, as refined in successive cases, including *Edwards Books and Art, supra*, at 768-9; *Keegstra, supra*, at 734-8; and *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 889. The balancing process must be performed with a thorough appreciation of context, which includes consideration of both the nature of the infringed right and the community needs: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1355-6 (*per* Wilson J.); *Keegstra, supra*, at 737.

Most recently, in *Ross, supra*, at 871-2, La Forest J., writing for the whole Court, summarized the balancing process under s. 1 and the importance of context to that analysis:

The factors to be considered in applying the *Oakes* test have frequently been reviewed, most recently in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, where both the majority and minority agreed that an

approach involving a "formalistic 'test' uniformly applicable in all circumstances" must be eschewed. Rather, the *Oakes* test should be applied flexibly, so as to achieve a proper balance between individual rights and community needs. In undertaking this task, courts must take into account both the nature of the infringed right and the specific values the state relies on to justify the infringement. This involves a close attention to context. McLachlin J. in *RJR-MacDonald*, *supra*, reiterated her statement in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at pp. 246-47, that conflicting values must be placed in their factual and social context when undertaking a s. 1 analysis.

La Forest J. went on to identify three contexts which he considered relevant to the s. 1 analysis in the case before him, namely, the educational context, the employment context and the anti-Semitism context.

In the present complaint, in addition to the nature of the infringing measure, discussed above, and to the nature and extent of the infringement, which will be considered below, the parties and intervenors advanced three contexts relevant to the s. 1 analysis. They are the anti-Semitism context, the media context, and the community context.

a. Anti-Semitism Context

The anti-Semitism context was succinctly described by La Forest J. in *Ross*, *supra*, at 875 as a recognition that Jews are "an historically disadvantaged group that has endured persecution on the largest scale." The existence and expression of anti-Semitism in Canada and elsewhere, both past and present, is beyond doubt. The fact that many of the leading *Charter* cases on freedom of expression and discrimination involve anti-Semitic speech and activities is a telling indication of the persistence of anti-Semitism in Canada and the continuing vulnerability of the Canadian Jewish community to it: see *Keegstra*; *Taylor*; *R. v. Andrews*, [1990] 3 S.C.R. 870; *R. v. Zundel*, [1992] 2 S.C.R. 731; *Ross*.

I also had the benefit of expert and other evidence on anti-Semitism. Professor Morton Weinfeld, a sociologist and Chair of Canadian Ethnic Studies at McGill University, was qualified by the Attorney General as an expert in ethnic and race relations, ethnicity and public policy, and modern Jewish studies. He was a knowledgeable and helpful witness. He canvassed the history of anti-Semitism in Canada and outlined some of its current dimensions. Of particular note was his testimony that although anti-Semitic stereotypes change over time, and there has been a reduction in the more overt forms of anti-Semitism in Canadian society, anti-Semitism cannot be said to have significantly decreased. Rather, anti-Semitism, like racism, is cyclical in nature; anti-Semitism is just as prevalent in current Canadian society as it was a few decades ago, but the forms it takes may be more subtle.

Professor Weinfeld described the key elements of current anti-Semitic thought in the following terms (T. May 21, p. 47):

The first, and one that has a long pedigree, is the notion of conspiracy. Jews are involved in an international conspiracy. They are conspiring against all sorts of individuals. There's a conspiracy theory. It goes back to the protocols of the elders of Zion at the turn of the century. It's found in Mein Kampf as a staple of Hitler's own world of view of anti-Semitism, and it is found throughout the anti-Semitic writings which I referred to earlier when I discussed the Barrett and other books as well. Apart from the conspiracy theory, we have the question of money and greed, which also has a long pedigree that may date back to charges of usury in the Middle Ages, and now is concerned primarily with Jews as being particularly greedy and focused on money. And third is the question of dishonesty, deception and disloyalty.

He added that Holocaust denial is a modern element of anti-Semitic thought and explained (T. May 21, pp. 48-52):

The Holocaust denial position which is well-represented in modern anti-Semitic writing, and I believe has been so recognized, it contains a number of elements similar to what I mentioned before. And the way in which it is applied to the Holocaust, remember I gave the idea of conspiracy, the Holocaust is a conspiracy and it's a hoax. It never occurred. There's the theme of deception. It certainly

never occurred the way most people believe it has. And how has that deception taken place? It is the result of a conspiracy which Jews have engineered, and therefore Jews are not to be trusted.

...

...the holocaust denial movement and perspective does not say that no Jews lost their lives at all. But the argument is often made that the numbers that were killed were many, many fewer than the usual six million, give or take, that historians of record have established, and that the way in which these deaths took place were part of the normal tragedies of warfare, in which all sorts of people lose their lives.

The expert opinion (Ex. 9) of Leonidas Hill, Professor Emeritus of History at the University of British Columbia, is also helpful in elucidating the anti-Semitic context. He provided a concise summary of the history of anti-Semitism and he identified Jewish control of banking and finance, and of the media as persistent anti-Semitic themes. (See also the essays in Alan Davies, ed., *Antisemitism in Canada: History and Interpretation* (Waterloo: Wilfred Laurier Univ. Press, 1992).)

b. Media Context

The media context comprises both the fundamental recognition that a vibrant and vocal free press is essential to the functioning of a democratic society, and an acknowledgment that the media wields considerable power over public perceptions and opinions, including the power to reinforce deep-seated social prejudices. It is also true that access to the media is not equally available to all.

With respect to the relationship between a free press and democracy, I agree with the BCCLA's submission that, although it is not an independent constitutional guarantee (see *Moises v. Canadian Newspaper Co.* (1996), 24 B.C.L.R. (3d) 211 at 227 (C.A.)), the express mention of freedom of the press in s. 2(b) of the *Charter* means that it is a fundamental value in our society. In its written argument, the BCCLA asserted:

The press has been historically and continues to be one of the most important mediums for the distribution of ideas within the democratic forum. A free press is vital to self-government by citizens.

I agree. Judicial recognition of this value pre-dates the *Charter*. In *Reference re Alberta Statutes*, *supra*, at 145-6, Cannon J. said:

Under the British system, which is ours, no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the Government. Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the Government concerning matters of public interest. There must be an untrammelled publication of the news and political opinions of the political parties contending for ascendancy.

(See also *Reference re Alberta Statutes*, *supra*, at 132-5 per Duff C.J.)

Yet, precisely because of its important role in the public dissemination of ideas, facts and opinions, the media has considerable power to shape public perceptions. Freedom of the press carries with it the obligation to exercise the freedom responsibly, and there is cause for concern on this score. As David Lepofsky put it (M.D. Lepofsky, "The Role of "The Press" in Freedom of the Press," in F.E. McArdle, ed., *The Cambridge Lectures, 1991*, (Cowansville, Quebec: Yvon Blais, 1993) 83-4):

...the mass media in Canada is typified by three core attributes. The first is that it constitutes a very powerful force in our society. It is capable of irreversibly making or breaking public and private careers and reputations at lightening speed, defining the agenda for debate on public issues. Second, the ownership of Canadian newspaper and broadcast establishments is intensely concentrated in the hands of a very small number of corporate owners. Third, whether or not news outlets do their job as effectively as they could, Canadians are substantially dependent on these establishments for information about each other, about our government, and about the world around us.

In the present case, Professor Weinfeld's evidence demonstrated, by reference to specific historic examples, that the press in Canada has played an instrumental role in reinforcing discriminatory public attitudes towards historically disadvantaged groups. In his expert opinion (Ex. 24, p. 3), scholarly studies of the Canadian media have revealed "systemic patterns of stereotyping and bias" which discriminate against minorities. He reviewed studies demonstrating how British Columbia newspapers not only reflected, but also endorsed and reinforced anti-Japanese public sentiment that culminated in the internment of Japanese Canadians during World War II (T. May 21, pp. 4-5; 10-11) The role of the media in disseminating and reinforcing anti-Semitism is evident in the anti-Semitic stance of the Quebec press in the 1930s, which contributed to the public climate of anti-Semitism and influenced the restrictive federal government policy on the admission of German Jewish refugees in 1939 (T. May 21, p. 12).

Although he considered some different examples, including the very recent role of community newspapers in defining ethnic target groups for persecution and intimidation in the former Yugoslavia, Robert Anderson, Professor of Communication at Simon Fraser University, who was qualified as an expert in communications, arrived at the same conclusion as Professor Weinfeld. He wrote (Ex. 8, p. 3):

The history of the press in British Columbia also shows how mainstream journalism, in the past, framed the negative thinking of the majority about ethnic minorities [natives, Chinese, Japanese, Jews, etc.]. This framing and interpreting was accompanied by systemic institutional discrimination.

The ability to influence the public through the media is not shared equally by all members of society. The expert opinion of Professor Anderson, and the evidence of Tim Renshaw, managing editor of the Respondent, North Shore News and Gerald Porter, Executive Secretary of the Press Council, established that members of the press, such as editors, reporters and columnists have far greater access to the forum of influence provided by the media than do ordinary members of the public. As between columnists and reporters, columnists are afforded the opportunity to express their opinions to the public more directly and regularly than reporters. Professor Anderson's

opinion states that it is columnists rather than reporters who set the tone of a community newspaper (Ex. 8, pp.4-5). The primary means of access to the forum provided by the press for the ordinary citizen is by writing a letter to the editor. Mr. Porter and Mr. Renshaw said that the prominence and space given to a regular columnist's opinions far outweighs that given to a letter to the editor. Moreover, as Mr. Renshaw testified, the decision to publish a letter rests with the editor; the ordinary citizen has no right of access to the press. (See also *Gay Alliance Toward Equality v. The Vancouver Sun*, [1979] 2 S.C.R. 435.)

In summary, the media context reveals the fundamental importance of a free press. However, it also reminds us that the press is an important forum for directing and influencing public opinion, and that access to this forum is disproportionately available to media "insiders" such as columnists as compared to ordinary citizens. Freedom of the press from government is of unquestionable importance. It is also important to recognize in the press the kind of powerful private institution that Madam Justice Wilson identified as capable of diminishing the rights and freedoms of the vulnerable (*McKinney, supra*, at 353-6).

c. Community Context

In the present case, the community context requires an appreciation of the particular community in which the impugned communication appeared, and the role of the Respondent newspaper, which provided the means of dissemination. According to Mr. Renshaw, who was uncontradicted on these points, the North Shore is an urban community of about 160,000, with diverse social, cultural and economic representation. It includes three municipalities: North Vancouver City, North Vancouver District and West Vancouver District. Michael Elterman, Chairman of Canadian

Jewish Congress, Pacific Region, testified that, as with other Vancouver suburbs, there is a rapidly expanding Jewish population on the North Shore.

Mr. Renshaw testified that, at the relevant time, the North Shore News was the only community newspaper on the North Shore. It is published three times per week and is delivered free of charge to "every door on the North Shore" (T. May 27, p. 7). According to Professor Anderson, "community newspapers play an important role in the development and improvement (or deterioration) of tolerance within communities..." (Ex. 8, p. 1). A community newspaper in an urban community, such as the Respondent newspaper, would be widely read and would influence the climate of public opinion on the North Shore, despite the presence of other newspapers and media in that community.

3. Nature and Extent of Infringement

Consideration of the nature and extent of the infringement of freedom of expression entails an examination of how the expression in issue relates to the rationales underlying the s. 2(b) guarantee. In *Ross, supra*, at 876-7, La Forest J. explained the values underlying s. 2(b) of the *Charter* and the significance of the expression in issue to them:

In my reasons in *RJR-MacDonald, supra*, I stated that the "core" values of freedom of expression include "the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process" (p. 280). This Court has subjected state action limiting such values to "a searching degree of scrutiny" (p. 281). This standard of scrutiny is not to be applied in all cases, however, and when the form of expression allegedly impinged lies further from the "core" values of freedom of expression, a lower standard of justification under s. 1 has been applied.

Although La Forest J. dissented in *RJR-MacDonald*, he wrote the unanimous judgment of the Court in *Ross*, so his remarks about the nature of the expressive infringement in the latter case are authoritative. La Forest J. went on to endorse the views of Dickson C.J., writing for the majority in *Keegstra*, that "hate propaganda" strays from the core values underlying freedom of expression so that restrictions on such expression are easier to justify (*Ross, supra*, at 877), and

quoted with approval the following passage from Dickson C.J.'s reasons (*Keegstra, supra*, at 765):

I am very reluctant to attach anything but the highest importance to expression relevant to political matters. But given the unparalleled vigour with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful, I am unable to see the protection of such expression as integral to the democratic ideal so central to the s. 2(b) rationale.

In *Keegstra*, the expression in issue was expression which promotes hatred of identifiable groups within the meaning of s. 319(2) of the *Criminal Code*. "Identifiable group" is defined to mean "any section of the public distinguished by colour, race, religion or ethnic origin" (ss. 318(4); 319(7)). This is a narrower restriction on expression than that in s. 7(1)(b) of the *Code*.

In *Ross*, however, the Court also found the expression in issue not to be closely tied to the core values underlying freedom of expression so that limits on such expression would be comparatively easier to justify. La Forest J. adopted the Board of Inquiry's characterization of the expression in question as expression the primary purpose of which was "to attack the truthfulness, integrity, dignity and motives of Jewish persons". He went on to explain that such expression was not closely tied to any of the three rationales for freedom of expression. First, it did not further the truth-seeking rationale because such expression "silences the views of those in the target group and thereby hinders the free exchange of ideas". Protecting such expression undermines "the principle that all views deserve equal protection and muzzles the voice of truth." Second, the individual autonomy and self-development of Jewish people is hindered by "expression that incites contempt for Jewish people on the basis of an 'international Jewish conspiracy'." Third, the democratic rationale is undermined by expression that "impedes meaningful participation in social and political decision-making by Jews, an end wholly antithetical to the democratic process." (*Ross, supra*, at 877-8.)

The expression La Forest J. considered in *Ross* was somewhat different than the expression in issue in the present case because what was under review was the decision of a human rights board of inquiry rather than a legislative provision. Therefore the restricted expression was limited to the specific anti-Semitic speech and activities of Mr. Ross. La Forest J.'s discussion of the nature of the expressive infringement in that case is nevertheless germane to the present context because it sets out an analytical approach to this issue, and it indicates that expression falling outside the scope of s. 319(2) of the *Criminal Code* may also be less closely tied to the rationales underlying s. 2(b) of the *Charter*. Moreover, his discussion of the kind of expression which will be considered to attract a lesser degree of scrutiny under s. 1 is clearly applicable to the kind of expression which is caught by s. 7(1)(b) of the *Code*. In my view, expression that is "likely to expose" a person or group to "hatred or contempt" on the basis of the grounds set out in the *Code* is the kind of expression which could be said to be likely to silence the views of the target group and thereby hinder the free exchange of ideas. Similarly, it would be likely to hinder their individual autonomy and self-development, and tend to impede their meaningful participation in the democratic process, in much the same way that the expression in *Ross* was found to do. (See also *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1174 where the Supreme Court described defamatory statements as expression which is inimical to the search for truth and which undermines the other core values underlying freedom of expression.)

My conclusion is buttressed by the majority decision in *Taylor*. *Taylor* was a *Charter* challenge to s. 13(1) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended, which prohibits the repeated telephonic communication of "any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination." The prohibited grounds of discrimination in the *Canadian Human Rights Act* are very similar to the grounds in the *Code*. The form of the communication in the federal legislation is different from the forms subject to s. 7(1)(b), but, in my view, this is not relevant to the issue of the relationship between the kind of expression restricted and the values underlying freedom of expression. Regardless of the range of forms prohibited by the legislation, the nature of the expression restricted in both statutes is that which

is "likely to expose ... to hatred or contempt" on the basis of a similar set of identifiable personal characteristics.

In *Taylor, supra*, at 922, Dickson C.J., writing for the majority, stated that although the expressive activity caught by s. 13(1) of the *Canadian Human Rights Act* was not identical to that in s. 319(2) of the *Criminal Code*, it was sufficiently similar that it was appropriate to adopt his conclusion in *Keegstra* that such expression is not closely tied to the values underlying s. 2(b) and should therefore attract a lesser degree of scrutiny.

In my view, the reasoning of the majority of the Supreme Court of Canada in *Keegstra* and *Taylor*, as endorsed in the unanimous judgment of the Court in *Ross*, determines the issue for the purposes of this complaint. The nature of the expression restricted by s. 7(1)(b) of the *Code* is such that the limitation will be easier to justify than it would be if it were closely tied to the core values underlying s. 2(b) of the *Charter*. My conclusion on this point together with the role of remedial legislation and the three applicable contexts discussed above, will be used in both the interpretation of the legislation and the assessment of its justifiability under s. 1.

B. Interpretation of Section 7(1)(b) in Light of the Charter

In approaching the task of statutory interpretation in light of the *Charter*, the objective is to give the statute that meaning it can reasonably bear which is most consistent with the *Charter's* values. That is, the statute should be read in such a way as to increase the likelihood that it would be found to be constitutionally valid if assessed against the *Charter*. As I noted earlier, this was the approach to interpretation taken by the Supreme Court of Canada in *Butler*. However, the statutory language cannot be stretched beyond what is reasonable. Interpreting legislation in light of the *Charter* is confined to reading the language as drafted; it is not the equivalent of a "reading in" or "reading down" remedy that is available once legislation has been found to be unconstitutional.

In the present case, my interpretation of the scope of s. 7(1)(b) is influenced by the general factors which I have identified, as well as the three more specific contexts that arise from the circumstances of this complaint. With respect to the general factors, the legislation is constitutionally suspect because it infringes s. 2(b) of the *Charter*, which would favour the narrowest possible construction. However, the other two general factors, that the expression that is restricted is not closely tied to the core values underlying s. 2(b) and that the provision is found in a human rights statute, favour a more liberal construction of the section. Although it may appear that two factors which favour a more liberal construction "outweigh" one factor favouring a stricter construction, constitutional interpretation cannot be reduced to a mathematical equation. The presence of competing general factors means only that the provision should not be as strictly construed as it would otherwise have been without the "liberalizing" factors, nor as liberally as it might have been without the "infringing" factor.

With respect to the more specific contexts which arise in this case, the prevalence of anti-Semitism directs me to be sensitive to the demonstrated and ongoing vulnerability of Jewish people to discrimination and hatred. The media context requires me both to appreciate the importance of a free press to democracy and to acknowledge its considerable power to influence public perception and debate, which can sometimes be abused. Finally, the community context focuses attention on the particular role of a community paper in an urban community.

Before embarking on the analysis, it is necessary to deal with two preliminary issues which were addressed at some length by the parties and intervenors. The first concerns the relationship of s. 7(1)(b) to the common law of defamation. The second concerns the relevance of judicial interpretation of s. 13(1) of the *Canadian Human Rights Act* to the interpretation of s. 7(1)(b) of the *Code* and, in particular, the extent to which the decision in *Taylor* determines the scope of the *Code* provision.

1. Relationship of Section 7(1)(b) to Defamation Law

In his submissions, counsel for the Complainant drew upon the common law of defamation as a useful analogy to illustrate the kind of restriction on freedom of expression that has been found to be constitutionally acceptable. Counsel for the Deputy Chief Commissioner and for the BCHRC cautioned that defamation law is of limited relevance in the present context, because it is fundamentally concerned with reputation, whereas human rights law is concerned with protection from discrimination.

In marked contrast to these positions, much of the Press Council's constitutional argument rested upon the assumption that the common law of defamation forms a constitutional minimum standard, so that to the extent that the scope of s. 7(1)(b) diverges from the doctrines of defamation law, the section is unconstitutional. Implicitly, this would require that the section be interpreted, insofar as possible, to have the same reach as defamation law. The Press Council referred to s. 7(1)(b) as creating a statutory cause of action for group defamation. The extent to which the Respondents adopted this position was not made clear. Their submissions assert that the absence from s. 7(1)(b) of defenses available in common law defamation actions, as well as in the *Criminal Code*, demonstrate that the legislation is unconstitutional.

The only authority provided by the Press Council for its assertion that defamation law effectively sets the constitutional standard for what is a justifiable infringement of freedom of expression, at least in a non-criminal context, was the *Report of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1966) ("Cohen Report"). Counsel directed me in particular to pp. 60-66. I cannot find any support for this proposition there or elsewhere in the Cohen Report. Indeed, given the date of the Cohen Report, it is hard to see its relevance to this issue.

It is true that in *Hill, supra*, at 1188, the Supreme Court of Canada unanimously held that, at least in the context of its application to the parties in that action, "the common law of defamation complies with the underlying values of the *Charter* and there is no need to amend or alter it."

Even if counsel had relied on this passage, I cannot interpret it as a conclusion that the balance struck between the value of freedom of expression and the value of an individual's reputation in defamation law is precisely the same balance that must be struck when balancing freedom of expression against a different value, such as freedom from discrimination. The conclusion in *Hill* was that the common law of defamation strikes an acceptable balance, not that it exhausts the range of constitutionally permissible restrictions on expression. The position of the Press Council cannot be reconciled with the restrictions on expression upheld by the Supreme Court in *Taylor* and *Ross*, among other cases. In my view, the common law of defamation may provide a guide to the kinds of restrictions on expression that have been found acceptable in a different context; it does not dictate the limits of justifiable legislative restrictions on freedom of expression in a human rights context.

2. Relevance of *Taylor* to Section 7(1)(b)

Essentially, the parties and intervenors supporting the constitutional validity of s. 7(1)(b) rely on *Taylor* as very persuasive authority with respect to the interpretation of the scope of s. 7(1)(b) and with respect to the constitutionality of the section. *Taylor*, they say, both strongly suggests how the section should be read and that it is justified under s. 1 of the *Charter*. Those challenging the constitutional validity of s. 7(1)(b) argue that *Taylor* is of little or no assistance for either purpose because s. 13(1) of the *Canadian Human Rights Act*, which was in issue in *Taylor*, is not sufficiently similar to the provision before me and, in any event, *Taylor* is no longer a reliable authority because of the Supreme Court of Canada's subsequent decision in *Dagenais*. Counsel for the Respondents went so far as to say that *Dagenais* was an "earthquake" in the s. 1 analysis and effectively overruled *Taylor*.

I do not agree that *Taylor* or, for that matter, *Keegstra*, or any other of the pre-*Dagenais* decisions of the Supreme Court of Canada are in any way diminished by the reasoning in *Dagenais*. Nothing in *Dagenais* itself suggests such a conclusion; in fact, neither *Keegstra* nor *Taylor* are mentioned

in the decision. Further, the extent to which *Dagenais* has actually altered the s. 1 analysis is not clear. The reformulation of the third step of the proportionality analysis which was stated in *Dagenais* has not always been followed in subsequent cases: for example, see *Ross, Egan v. Canada* [1995] 2 S.C.R. 513, *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, and, most recently, *Eldridge v. British Columbia (Attorney General)* (9 October 1997), No. 24896 (S.C.C.). I will deal with this issue in detail when assessing the legislation at that stage of the s. 1 analysis.

With respect to the persuasiveness of *Taylor*, there can be no question that it is a useful interpretive aid in determining the scope of s. 7(1)(b) of the *Code*. The striking similarity between the standard for expression restriction caught by s. 13(1) of the *Canadian Human Rights Act* and that caught by s. 7(1)(b) of the *Code* requires me to consider carefully the meaning of "likely to expose ... to hatred or contempt" in s. 13(1) when interpreting the identical words in s. 7(1)(b). It does not follow from this, however, that *Taylor* determines the scope of the *Code* provision or its constitutional validity. There are also clear differences between the two provisions which may well affect both the interpretation and the constitutional validity of s. 7(1)(b).

3. Meaning of Section 7(1)(b)

Section 7(1)(b) of the *Code* prohibits the publication of any statement that is *likely to expose* a person or group of persons to *hatred or contempt* because of race, religion, ancestry or various other grounds. The scope of the section's restriction on expression turns on how these two emphasized phrases are read. It is convenient to consider them in reverse order.

Both the Complainant and the Respondents submitted that "hatred or contempt" should be accorded the same meaning in s. 7(1)(b) of the *Code* as that given to the phrase by the Supreme Court of Canada in *Taylor*. In *Taylor*, the Court considered the phrase in the context of the minimal impairment requirement in the s. 1 analysis. Dickson C.J. held that, despite the general

principle that human rights legislation should be given a large and liberal interpretation, s. 2(b) of the *Charter* requires that the phrase be read more narrowly, as aimed at "reducing the incidence of harm-causing expression." (*Taylor, supra* at 927.) He endorsed the interpretive approach taken by the Canadian Human Rights Tribunal in *Nealy v. Johnston* (1989), 10 C.H.R.R. D/6450 as consistent with the *Charter* (*Taylor, supra*, at 928-9):

The reference to "hatred" [in *Nealy*] speaks of "extreme" ill-will and an emotion which allows for "no redeeming qualities" in the person at whom it is directed. "Contempt" appears to be viewed as similarly extreme, though is felt by the Tribunal to describe more appropriately circumstances where the object of one's feelings is looked down upon. According to the reading of the Tribunal, s. 13(1) thus refers to unusually strong and deep-felt emotions of detestation, calumny and vilification, and I do not find this interpretation to be particularly expansive. To the extent that the section may impose a slightly broader limit upon freedom of expression than does s. 319(2) of the *Criminal Code*, however, I am of the view that the conciliatory bent of a human rights statute renders such a limit more acceptable than would be the case with a criminal provision.

In sum, the language employed in s. 13(1) of the *Canadian Human Rights Act* extends only to that expression giving rise to the evil sought to be eradicated and provides a standard of conduct sufficiently precise to prevent the unacceptable chilling of expressive activity. Moreover, as long as the Human Rights Tribunal continues to be well aware of the purpose of s. 13(1) and pays heed to the ardent and extreme nature of feeling described in the phrase "hatred or contempt", there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section.

McLachlin J. dissented on this point in *Taylor*, finding the terms hatred and contempt to be "vague", "subjective" and "emotive" because they are not explicitly defined in the statute (*Taylor, supra*, at 961-2). However, I am unable to distinguish the reasoning of the majority in *Taylor* in interpreting the phrase "hatred or contempt" in the context of s. 13(1) from the meaning of the phrase as it is used in s. 7(1)(b) of the *Code*. The phrase serves the same purpose in both statutes: it substantively defines a range of prohibited expression for the remedial purposes of a human rights statute. The fact that the *Code* provision covers a broader range of forms of expression than does the federal provision, which is restricted to repeated telephonic

communication, does not, in my view, affect the meaning of "hatred or contempt." Neither does the meaning of the phrase turn on any difference in messages in issue in each case: whether the article in issue in the present case can be classified as "hatred or contempt" is a determination of the merits of the complaint which will necessarily differ in every case.

I conclude, therefore, that the phrase "hatred or contempt" for the purposes of s. 7(1)(b) of the *Code* should be read as embodying the same meaning, described above, as it has in s. 13(1) of the *Canadian Human Rights Act*. That meaning was held to be consistent with the *Charter* in *Taylor*; it seems to me that it is the appropriate meaning to give to the provision when reading it in light of the *Charter* in the present context.

The meaning of "likely to expose" is not as easily determined. It was not discussed explicitly by either the majority or the minority of the Supreme Court of Canada in *Taylor*, although implicitly it was clearly a factor in the divergence between the judgments on the scope of the expression caught by s. 13(1). Unlike "hatred or contempt", this phrase, in my view, is more closely tied to the forms of expression caught by the statutory provision and, in this respect, s. 13(1) of the *Canadian Human Rights Act* differs markedly from s. 7(1)(b) of the *Code*. The only mention of "likely to expose" in the majority judgment of the Supreme Court of Canada in *Taylor* occurs in relation to the requirement that the telephonic communications must be "repeated" (*Taylor, supra*, at 938). This suggests that "likely to expose" is related to the form or method of communication. Interpretation of the phrase is crucial, however, in determining the degree to which the statute intrudes on freedom of expression.

More explicit consideration of the meaning of "likely to expose" is found in the decision of the Canadian Human Rights Tribunal in *Nealy*, where that Tribunal also referred to the Tribunal's decision in *Taylor* (*Canada (Canadian Human Rights Commission) v. Western Guard Party and John Ross Taylor* (July 20, 1979) Can Trib (unreported)). Although these decisions do not carry the same persuasive weight as the Supreme Court of Canada's reasoning and, as I have indicated, the interpretation of "likely to expose" may not be the same because of the different forms of

expression restricted in the two statutes, it is useful to consider the federal tribunals' approach to this issue. In *Nealy*, *supra*, at D/6470, the Tribunal said:

The Tribunal in [*Taylor*] also considered the meaning of "expose" in s. 13(1) [at p. 29]:

"Expose" is an unusual word to find in legislation designed to control hate propaganda. More frequently ... the reference is to matter which is abusive or offensive, or to statements which serve to incite or promote hatred.

"Incite" means to stir up; "promote" means to support actively. "Expose" is a more passive word, which seems to indicate that an active effort or intent on the part of the communicator or a violent reaction on the part of the recipient are not envisaged. To expose to hatred also indicates a more subtle and indirect type of communication than vulgar abuse or overtly offensive language. "Expose" means: to leave a person unprotected; to leave without shelter or defence; to lay open (to danger, ridicule, censure, etc.). In other words, if one is creating the right conditions for hatred to flourish, leaving the identifiable group open or vulnerable to ill-feelings or hostility, if one is putting them at risk of being hated, in a situation where hatred or contempt are inevitable, one then falls within the compass of s. 13(1) of the *Human Rights Act*.

This Tribunal accepts the explication of the use of the word "expose" in s. 13(1) set out in the *Taylor* decision, *supra*. We note, as the excerpt suggests, that there is no need for the complainants to prove an active effort or intent on the part of the respondents to produce the adverse consequence contemplated by the section. Moreover, the use of the wording "likely to expose a person or persons to hatred or contempt" means that it is not necessary that evidence be adduced that any particular individual or group took the messages seriously and in fact directed hatred or contempt against another or others, still less that anyone has in fact been victimized in this way. It is enough to prove that the matter in the messages is more likely than not to spark a positive reaction amongst some of the listeners to it which will likely in turn manifest itself in "hatred" or "contempt" towards the targets of the messages. Furthermore, in making the case on the potential impact of the matter on recipients of it, the test is not the "reasonable listener" but whether there is anybody, even the most malevolent or unthinking person, who might be inspired to treat the targets with hatred or contempt.

In my view, the reasoning of the federal Tribunals in *Taylor* and *Nealy* is useful, but not determinative of the meaning of the phrase in s. 7(1)(b). As I have noted, s. 7(1)(b) catches a much broader range of expression than repeated telephonic communications. The *Code* provision reaches the publication, issuance or display of any "statement, publication, notice, sign, symbol, emblem or other representation" other than a private communication or a communication intended to be private (see s. 7(2)). Although the terms hatred and contempt have been narrowly defined, in my view, the scope of the section would exceed the justifiable limits on freedom of expression, given its broad coverage of forms of communication, if "likely to expose" included the probable reaction of "even the most malevolent or unthinking" recipient of the communication.

It is understandable that the Tribunal in *Nealy* applied a "gullible or malevolent listener" standard. The more usual "reasonable person" standard is clearly inappropriate in the context of provisions such as s. 13(1) of the *Canadian Human Rights Act* or of s. 7(1)(b) of the *Code*, if what is required is a finding that a reasonable recipient of the communication in issue would be likely to be persuaded to hatred or contempt, because that is precisely how we, as a society, would like to believe reasonable people would *not* react. It is true that doubt has been expressed about the efficacy of the truth-seeking rationale underlying freedom of expression in extreme cases (see, for example, Dickson C.J. in *Keegstra*, *supra* at 762-3). However, the truth-seeking rationale is a fundamental tenet of our liberal society. This means that, despite the sorry historical evidence of the persuasiveness of such expression, we generally believe that reasonable people will reject hate. Thus, I believe that it would be a very rare case in which a message would be found to be both so hateful and so persuasive that a *reasonable* person would be considered likely to be convinced or inspired to hatred by it. To interpret s. 7(1)(b) as requiring a reasonable person to be likely to be *persuaded* to hatred or contempt is too onerous a standard. However, in my view, applying a "gullible or malevolent listener" standard is also inappropriate, because it casts the net too wide. Applying this standard, it would be a very rare case where it could *not* be said that the message was so innocuous or ineffective that not even the most gullible or malevolent recipient would be likely to be persuaded by it.

I believe that consideration of the general role and purpose of human rights statutes leads to an alternative interpretation of "likely to expose" that is both a reasonable reading of the words and which more closely accords with the *Charter*'s injunction to ensure that freedom of expression is restricted as little as possible. Human rights codes do not act directly on people's minds, they modify people's behaviour. They are based on a recognition that deep-seated, historic prejudices against persons or groups because of identifiable personal or attributed characteristics are a sad reality within our society, and that, as far as possible, we should prevent discriminatory actions consequent upon such beliefs from being visited upon members of vulnerable groups. Consistent with this orientation, s. 7(1)(b) of the *Code* is not so much concerned with the existence of hatred or contempt towards a vulnerable person or group, it is directed at the manifestation of hatred or contempt. The s. 7(1)(b) inquiry is therefore not into whether the communication in issue is likely to persuade a recipient to feel hatred or contempt, but about whether the communication is likely to increase *the risk of manifestation* of hateful or contemptuous behaviour. In other words, can it be said that the effect of the message is to increase the likelihood that members of the target group will be exposed to hatred or contempt because the message makes it more acceptable (and so more likely) for recipients to express or act upon their feelings of hatred or contempt for members of the target group? This is an assessment which can be made on a reasonable person standard. Moreover, it is consistent with the focus that use of the word "expose" gives the provision, as was recognized in the federal Tribunal's decision in *Taylor, supra*, at 29 (quoted in *Nealy, supra*, at D/6470) which, for convenience, I reproduce again here:

"Expose" means: to leave a person unprotected; to leave without shelter or defence; to lay open (to danger, ridicule, censure, etc.). In other words, if one is creating the right conditions for hatred to flourish, leaving the identifiable group open or vulnerable to ill-feelings or hostility, if one is putting them at risk of being hated, in a situation where hatred or contempt are inevitable, one then falls within the compass of s. 13(1) of the *Human Rights Act*.

This reading of s. 7(1)(b) rests on the assumption that deep-seated feelings of hatred and contempt for certain groups already exist in our society and flows from judicial recognition of "historically disadvantaged groups" as developed by the Supreme Court of Canada in its *Charter* s. 15

jurisprudence: see generally, *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1331-3; *Swain, supra*, at 990-2; *Egan, supra*, at 553-5 *per* L'Heureux-Dube J.; at 599-603 *per* Cory J.; *Eldridge, supra*, at paras 56-7. The expression of these hateful or contemptuous feelings can be legitimized, and the risk of exposure to such manifestations thereby increased, by hateful or contemptuous communications which create an environment that suggests that the expression of such views is acceptable. If this happens, the risk of victimization of the vulnerable group -- their experience of hatred and contempt -- will increase. In my view, this is what s. 7(1)(b) seeks to prevent. To the extent that the expression in issue makes it more acceptable to express or manifest hateful or contemptuous beliefs against a person or group characterized by a listed ground, whether those beliefs are pre-existing or have been caused by the expression, it is "likely to expose" a person or group to hatred or contempt.

Thus, read in light of the *Charter*, the assessment of an expression under s. 7(1)(b) requires application of a two-part test:

First, does the communication itself express hatred or contempt of a person or group on the basis of one or more of the listed grounds? Would a reasonable person understand this message as expressing hatred or contempt?

Second, assessed in its context, is the likely effect of the communication to make it more acceptable for others to manifest hatred or contempt against the person or group concerned? Would a reasonable person consider it likely to increase the risk of exposure of target group members to hatred or contempt?

The first requirement flows from an appreciation of the constraints on restrictions on freedom of expression imposed by the *Charter*. In my view, the section would be too chilling of fair commentary on sensitive and controversial issues if a message that was not hateful or contemptuous in itself could be caught by this prohibition. McLachlin J.'s dissent in *Taylor, supra*, at 965-8, identifies this as an important factor in her concern about the overbreadth of s.

13(1). I believe it can be addressed, at least in part, by confining the scope of s. 7(1)(b) to messages that are themselves hateful or contemptuous. This is also, in my view, a reasonable reading of the language of the section. The reasonable person standard is appropriate because the enquiry is into the meaning of the message read in its context, not its persuasiveness. The standard is an objective one. Although evidence, including expert evidence, about the meaning conveyed by communication in issue will be relevant, it is ultimately a question of mixed fact and law for the adjudicator.

In assessing whether a particular expression is hateful or contemptuous, the adjudicator will have to consider whether it conveys a meaning that achieves the degree of "unusually strong and deep-felt emotions of detestation, calumny and vilification" that is encompassed by the Supreme Court of Canada's reading of the phrase "hatred or contempt." At least three factors will be relevant to this assessment: the content of the expression (what is said), its tone (how it is said), and the vulnerability of the target group (about whom it is said). In any particular case, one factor might predominate or the hateful or contemptuous meaning might be the product of the interaction of two or more factors. For example, some ideas (or content) may be so extreme that they constitute hatred or contempt, despite being expressed in a dispassionate tone, about a group that is not particularly vulnerable to discrimination. For a much greater range of expression, however, in addition to content, tone and the vulnerability of the target group will be important, sometimes even decisive considerations. Tone and/or the vulnerability of the group can turn offensive and harmful content that would not otherwise amount to "unusually strong and deep-felt emotions of detestation, calumny and vilification" into an expression of "hatred or contempt". The more venomous or vitriolic the tone, and the more vulnerable the group, the more likely it is that the overall meaning conveyed by the expression will be hateful or contemptuous. For these kinds of expressions, the effect of s. 7(1)(b) is not so much to suppress the idea itself, but to regulate the manner in which it is expressed.

Acknowledging the importance of tone as a factor in determining whether an expression is hateful or contemptuous flows from recognition of hatred and contempt as emotions. But it does not mean

that s. 7(1)(b) only catches crude invective, "ranting and raving" or uncontrolled diatribe. Hate or contempt can be uttered with great sophistication, its venom clothed in the language of reason, and it is not any less hateful or contemptuous because of its polished tone.

Finally, it must be emphasized that requiring that the communication express hatred or contempt is in no way an inquiry into the intent of its author. Consistent with the general principles of anti-discrimination law, which asks only whether the effect of the activity was discriminatory (see *Taylor, supra*, at 931), the concern here is solely with the effect of the message.

With respect to the second part of the test, some of the factors relevant to this assessment include the vulnerability of the particular group to hatred or contempt; the character of the community of recipients of the communication; the expressive context of the message, for example, whether it is part of a published debate in which alternative points of view are expressed, and whether it is presented as opinion or fact; the content of the message, in particular, the degree to which it reinforces existing negative stereotypes of the group; and the method of dissemination, for example, a more "mainstream" form of communication may tend to legitimize the expression or manifestation of hatred by others than a less "mainstream" or more "marginal" vehicle. Once again, this is an objective assessment. Evidence of the impact of the communication, for example, will be relevant but not determinative. There is no requirement of proof of "actual harm" -- that any member of the target group was actually exposed to hatred or contempt expressed by a recipient of the communication or, for that matter, that any recipient of the communication expressed hatred or contempt at all. All that is required is an objective determination that the effect of the message was to make the manifestation of hatred or contempt more acceptable, thereby increasing the likelihood that the target group would be exposed to it. Likewise, there is no requirement of proof of active efforts on the part of the communicator to foment hatred or contempt; the focus is on the probable effect of the message. This is a question of mixed fact and law for the adjudicator.

What are the limits of the section, read in this way? It is possible that an author might intend to communicate hatred or contempt, but the message might not actually convey a hateful or contemptuous meaning. Alternatively, a message that is not itself hateful or contemptuous might nevertheless have the effect of making more acceptable the manifestation of hatred or contempt, thereby increasing the risk of the target group's exposure to it. That is, a communication might fail the first requirement but satisfy the second. Neither of these communications would be caught by s. 7(1)(b). However, they might contravene some other provision of the *Code*, such as s. 7(1)(a), which is not before me.

In sum, the interpretation I have given to s. 7(1)(b) requires that the communication in issue be found to express hatred or contempt where those words are understood as signifying "ardent and extreme" emotions of vilification or denigration of the person or group concerned, and that the likely effect of the communication is to make it more acceptable for others to express or manifest similarly extreme feelings, thereby increasing the target group's risk of exposure to hatred or contempt.

There is no question that this is a more restrictive (but not the most restrictive) interpretation of the scope of s. 7(1)(b) than the section might otherwise be given. In my view, however, it balances, as far as is possible, the underlying factors I identified at the outset as relevant to the task of interpretation, and takes into account the three relevant contexts, while ensuring that the language of the section is not strained beyond its range of reasonable meanings. Having interpreted the legislative provision in light of the *Charter*, it now remains to assess it against the *Charter* in order to determine whether, understood in this way, it is a demonstrably justifiable limit on freedom of expression.

C. Assessment of Section 7(1)(b) under Section 1 of the Charter

The framework for analysis of the justifiability of a legislative provision under s. 1 of the *Charter* is well-established. The most commonly cited formulation is found in *Edwards Books and Art, supra*, at 768-9:

Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern". Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights. The Court stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards.

See also: *Oakes, supra*, at 138-40; *Keegstra, supra*, at 735, 737; *Taylor, supra*, at 916; *RJR-MacDonald, supra*, at 328; *Ross, supra*, at 872; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at 502. All of these cases emphasize the importance of flexibility in applying the *Oakes* test. In the more recent decisions, the Court has repeatedly endorsed the contextual approach as necessary to ensure that the analytical framework set out in *Oakes* is applied with appropriate sensitivity to the circumstances of the particular case.

Before addressing the justifiability of s. 7(1)(b) of the *Code* in relation to the various elements of this well-known analytical framework, I note that in marshaling the various arguments which were advanced under s. 1 of the *Charter* by the parties and intervenors, I was not assisted by the Press Council's inexplicable disregard of the elements of the *Oakes* test in organizing its lengthy written submissions. Thus, the various arguments advanced by this intervenor are addressed in relation to the aspects of the *Oakes* test under which I believe they fall, rather than in relation to the aspect

of *Oakes* which counsel considered appropriate, as was the case with the other parties and intervenors.

Turning to the s. 1 analysis, the general factors and contexts that I identified at the outset of my consideration of the *Charter*, above, are very relevant to this inquiry. At the stage of assessing the legislation against the *Charter*, however, they play a somewhat different role than they did in the interpretive exercise.

The onus of establishing the justifiability of a limit on a *Charter* right rests on the party seeking to uphold the limit and must be satisfied on a balance of probabilities: *Oakes*, *supra*, at 136-7; *RJR-MacDonald*, *supra*, at 333. However, the degree of scrutiny or standard of justification to which the limit will be subjected in the s. 1 analysis will vary depending on the circumstances of the case: see *Keegstra*, *supra*, at 761, 766; *Taylor*, *supra*, at 921-3; *RJR-MacDonald*, *supra*, at 331-2; *Ross*, *supra*, at 876-7. The factors and contexts I have previously identified will determine the appropriate level of scrutiny to apply to the assessment of s. 7(1)(b) of the *Code* under the *Charter*. Once the appropriate level of scrutiny has been determined, and it is clear that the limit in issue satisfies the "prescribed by law" requirement, the analysis of the provision under the *Oakes* tests can proceed.

1. Level of Scrutiny

Determination of the appropriate level of scrutiny or the s. 1 analysis requires consideration of both "the nature of the legislation and the nature of the right infringed" (*Ross*, *supra*, at 876, quoting *RJR-MacDonald*, *supra*, per La Forest J. at 272). In approaching this question, it is useful to compare the legislative limit in the present case to that in issue in *Taylor*. In my view, there are certain factors which distinguish s. 7(1)(b) of the *Code* from s. 13(1) of the *Canadian Human Rights Act*. First, as far as the range of forms of expression is concerned, s. 7(1)(b) of the *Code* casts a wider net than s. 13(1). Despite the narrowness of the substance of the restriction, the

broad range of forms to which it applies somewhat increases the degree of infringement. Second, the fact that s. 7(1)(b) extends to the media lends additional weight to the degree of infringement. Although, as I have noted, freedom of the press is not protected to a greater extent than is the freedom of expression of an individual, the importance of a free press to democracy means that limitations on expression which extend to the media generally should be scrutinized carefully. On the other hand, s. 7(1)(b), like s. 13(1), is found in a human rights statute with quasi-constitutional status and an important remedial purpose. The type of expression limited by the section, as I have interpreted it, is narrowly confined to expression which itself is hateful or contemptuous and is likely to increase the target group's risk of exposure to hatred or contempt by making the manifestation of hatred or contempt more acceptable. Expression of this kind is not closely tied to the core values underlying the guarantee of freedom of expression in s. 2(b) of the *Charter*. Moreover, the scope of s. 7(1)(b) in this respect may be significantly narrower than s. 13(1) of the *Canadian Human Rights Act*, given the broader interpretation of "likely to expose" set out in *Nealy*. The group against which the expression in this case is aimed is clearly a historically disadvantaged group as that term was defined in *Turpin*, a group with a demonstrated and ongoing vulnerability to the expression of hatred and to discrimination. The expression in issue was widely disseminated throughout the relevant community through a publication which carries some degree of influence and status within the community. All of these latter considerations suggest that at least as, if not more, attenuated a level of scrutiny as was applied in *Taylor* would be appropriate.

While the degree of scrutiny to be applied in a s. 1 analysis cannot be determined with mathematical precision, I conclude that in the present case the level of scrutiny should be roughly comparable to that employed by the majority of the Supreme Court of Canada in *Taylor*.

Before leaving this issue, I wish to comment on two arguments which were made in respect of the severity of the infringement. First, although counsel for the BCCLA made eloquent submissions on the value of "extremist" expression, arguing that hate speech has intrinsic value and is closely tied to all three of the rationales underlying s. 2(b) of the *Charter*, I do not believe that it is open

to me to revisit that issue in light of the decisive reasoning of the Supreme Court of Canada on that point in *Keegstra*, *Taylor* and *Ross*. Second, insofar as I correctly understood the Respondents to be urging me to find that the scope of the infringement was greater because of the costs they incurred in choosing to mount a constitutional challenge to the legislation, I can find no basis in law or logic for such a conclusion.

2. Prescribed by Law

Having determined the appropriate level of scrutiny in the present case, one further issue remains to be addressed before assessing the legislation under the various branches of the *Oakes* test. Section 1 of the *Charter* requires that, in order to be demonstrably justifiable, a limit on a *Charter* right must be "prescribed by law." Two arguments were advanced that s. 7(1)(b) of the *Code* fails to satisfy this requirement.

The Respondents submitted that s. 7(1)(b) does not contain a limit prescribed by law because it is too vague, relying on Madam Justice McLachlin's discussion of the concept of vagueness in her dissenting judgment in *Keegstra*. However, that discussion was not in relation to the "prescribed by law" aspect of s. 1 of the *Charter*; no issue was taken in that case that s. 319(2) of the *Criminal Code* was a limit prescribed by law. Whether s. 13(1) of the *Canadian Human Rights Act* is a limit prescribed by law was, however, in issue in *Taylor*. There, McLachlin J., writing for the whole Court on this point, rejected the submission that the terms "hatred" and "contempt" and the phrase "likely to expose" as used in s. 13(1) were too vague to stipulate a limit prescribed by law. Referring to the reasoning of the Court in *Irwin Toy*, she affirmed that "prescribed by law" merely requires that the legislation provide an "intelligible standard", which is a less stringent requirement than the assessment of vagueness which may feature at the proportionality stage of the s. 1 analysis (*Taylor, supra*, at 955-6).

In the present case, I find that the limit in s. 7(1)(b) of the *Code* creates an intelligible standard for the same reasons as those given by McLachlin J. in *Taylor*. The separate question of whether the section is too vague to be sufficiently proportional for *Charter* purposes will be addressed in detail below.

The Press Council submitted that s. 7(1)(b) of the *Code* was not "prescribed by law" because it was *ultra vires* the province. Counsel conceded the novelty of this submission and was unable to point me to any authority for it. He admitted that his purpose in advancing it was to raise an issue that would otherwise have fallen outside the scope of the constitutional challenge defined by the Respondents in their notice of constitutional question. In an oral ruling, I rejected the proposition that the "prescribed by law" requirement in s. 1 requires an assessment of the *vires* of a legislative provision on the basis that this would effectively and improperly subsume the whole of division of powers analysis into s. 1 of the *Charter*. In any event, I have already determined that s. 7(1)(b) falls within provincial legislative jurisdiction.

3. Legislative Objective

A great deal of evidence and argument was devoted to the question of whether the legislative objective underlying s. 7(1)(b) is "of sufficient importance to warrant overriding a constitutional right" in that it bears on a "pressing and substantial concern" (*Edwards Books and Art, supra*, at 768). The crux of the disagreement between those supporting the legislation and those challenging it appeared to be whether "pressing" imports a requirement of present urgency that must be established through evidence of a "crisis" requiring legislative action, or at least a demonstrated and current measurable increase in the problem the legislation seeks to address. Those challenging the constitutionality of s. 7(1)(b) argued that "pressing" does require such proof and that the government had failed to adduce sufficient evidence of it in this case.

The issue arose in a preliminary way at the outset of the hearing when I was required to rule on the Respondents' applications for five summonses. Two of these sought the attendance of the custodian(s) of records within various ministries relating to the circumstances of every submission to Crown Counsel in B.C. concerning possible prosecutions under s. 319 of the *Criminal Code*, and the attendance of the custodian(s) of 42 files of complaints made under s. 2 of the former *Act* (now s. 7 of the *Code*). One of the grounds on which these summons were sought was that the documents were relevant to the issue of whether or not the legislative objective in issue was "pressing and substantial." In rejecting these applications, among other reasons, I found that "pressing and substantial" did not require the government to establish a "current crisis" requiring immediate legislative intention. I said (see Appendix 1.4, at 6):

[The issue] concerns the mischief or harmfulness of the behaviour that is sought to be controlled. It is not about the frequency of the behaviour -- including the behaviour as possibly measured by legal actions initiated under [the same or] other legislative regimes which address the same social problem. For example, the legislative objective informing the culpable homicide provisions of the Criminal Code would not become vulnerable to a challenge under section 7 of the Charter simply because no such homicides had been committed in Canada for a period of years. Nor would the objective of provincial legislation dealing with related matters, for example, compensation to victims or their families, become any less constitutionally valid for this reason.

In closing argument, counsel for the Respondents and supporting intervenors urged me to reconsider the meaning of "pressing and substantial." Counsel for the Respondents argued that the effect of the *Dagenais* decision was to change all parts of the *Oakes* test and, as far as the first branch is concerned, the government must now adduce evidence to establish a "substantial practical basis for its concern" which, in turn, requires empirical proof that the problem is both prevalent and urgent. The dictum in *RJR-MacDonald*, *supra*, at 345-7, about the importance of full disclosure by government of all relevant evidence was also relied upon. In the circumstances of this case, the Respondents argued that proof that there is a "crisis" or serious problem of incidents of racism in the mainstream press was required. The Press Council supported this position and added that the legislative objective of s. 7(1)(b) could not be pressing and substantial

because there were other mechanisms to address the same social problem, such as the *Criminal Code*, the *Civil Rights Protection Act* and the Press Council itself. Counsel for the BCCLA took a slightly different position. He conceded that the legislative objective was "substantial" but asserted that "pressing" requires a demonstration that there is "actual social conflict causing actual social harm." He took no position as to whether this had been demonstrated on the evidence before me.

I do not accept these submissions. In his decision in *Dagenais*, Lamer C.J. expressly confined his consideration of the importance of assessing both salutary and deleterious effects of a measure to the third step of the proportionality analysis. He described the importance of the legislative objective as something viewed in the abstract, contrasting it to the effects analysis in the third test of proportionality. (*Dagenais*, *supra*, at 887-8; see also *Libman v. Quebec (Attorney General)*, (9 October 1997), No. 24960 (S.C.C.) at para. 38.) Indeed, to accede to the Respondents' submission and assess effects at every stage of the *Oakes* test would go much farther than to interpret the test flexibly in the circumstances of each case, as the jurisprudence requires. It would effectively eliminate the analytical distinctions between the various steps of *Oakes*, collapsing it into a single inquiry. Similarly, I do not find that *RJR-MacDonald* assists the Respondents and their supporters on this issue. Madam Justice McLachlin's criticism of the government's failure to disclose relevant evidence was directed at evidence about the particular legislative measure (a total as opposed to a partial ban on tobacco advertising) which was clearly relevant to the minimal impairment test of proportionality (*RJR-MacDonald*, *supra*, at 345-6). It is noteworthy that despite the absence of this evidence, McLachlin J. had little difficulty characterizing the legislative objectives of reducing advertising-related consumption of tobacco and providing warnings of tobacco-related dangers to health as pressing and substantial. Moreover, she arrived at this conclusion without finding it necessary to refer to any evidence (*RJR-MacDonald*, *supra*, at 335-6).

Finally, the presence or absence of other mechanisms to address the social problem at which the legislative measure is directed does not make the objective of the measure in issue any less

pressing and substantial than it would otherwise be. It is at least as plausible to interpret the existence of a variety of measures directed at the same social problem as an indication of the severity and complexity of the problem (and the need for additional measures) as it is to interpret the existence of other measures as reducing the need for the measure in question. In *Taylor*, the existence of s. 319(2) of the *Criminal Code* did not affect the finding that the objective of s. 13(1) of the *Canadian Human Rights Act* was pressing and substantial (*Taylor, supra*, at 917-21 *per* Dickson C.J. and 957-8, *per* McLachlin J.). The Court has held that government is entitled to use a variety of regulatory measures, or "multi-pronged approaches", to address complex social problems; the *Charter* does not require government to choose a single regulatory approach: *Butler, supra*, at 508-9; *Keegstra, supra*, at 784-5.

An assessment of whether a particular legislative objective is pressing and substantial must start with an appreciation that it is extremely rare for courts to find that a legislature's chosen objective is not sufficiently serious or important: Hogg, *supra*, at 870; P. Macklem *et al.*, *Canadian Constitutional Law*, vol. 2 (Toronto: Emond Montgomery, 1994) at 180. A far more searching scrutiny is applied to the assessment of whether the mechanism employed to achieve the objective (the proportionality analysis) is constitutionally justifiable than to whether the underlying goal is constitutionally legitimate. This difference in the standard of review may well reflect judicial respect for the institutional relationship between courts and legislatures.

In no case of which I am aware has a court found the objective of any type of restriction on hateful, contemptuous or similarly harmful speech to be anything other than pressing and substantial: see for example, *Butler, Keegstra, Taylor, Ross*. At the outset of her majority judgment in *Zundel, supra*, at 743, McLachlin J. took pains to distinguish what she considered to be the constitutionally legitimate legislative objective of restricting, even criminalizing, racial slurs and hate speech from criminalization of the "much broader and vaguer class of speech -- false statements deemed likely to injure or cause mischief to any public interest" in s. 181 of the *Criminal Code*. The pressing and substantial nature of the legislative objective underlying both

criminal and non-criminal restrictions on hateful expression, together with acceptance of the proposition that such expression causes harm, has been repeatedly recognized by the entire Court.

In *Taylor*, the legislative objective underlying the prohibition in s. 13(1) of the *Canadian Human Rights Act* which, as I have already noted, is strikingly similar to the prohibition in s. 7(1)(b) of the *Code*, was found by both the majority and the minority to be pressing and substantial. Dickson C.J. found that the legislative objective of s. 13(1) could be gleaned from the express statement of purpose in s. 2 of the *Canadian Human Rights Act*, which he summarized as "the promotion of equal opportunity unhindered by discriminatory practices based on, *inter alia*, race or religion" (*Taylor, supra*, at 918). He characterized the expression prohibited by s. 13(1) as seriously harmful both to targeted individuals and to society, both in itself and because it may precipitate an increase in acts of discrimination (*Taylor, supra*, at 919):

It can thus be concluded that messages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.

Dickson C.J. referred to a number of studies in support of this conclusion, including the Cohen Report; the 1981 *Report Arising Out of the Activities of the Ku Klux Klan in British Columbia* by John D. McAlpine; *Equality Now!: Minutes of Proceeding and Evidence of the Special Committee on Participation of Visible Minorities in Canadian Society* (Ottawa: Supply and Services, 8 March 1994) (Chair: R. Daudlin, M.P.); and the Law Reform Commission of Canada's *Hate Propaganda* (Working Paper 50) by Mr. Justice A.M. Linden et al (Ottawa: Law Reform Commission, 1986), all of which were tendered in evidence before me. He also referred to international law and jurisprudence, and to ss. 15 and 27 of the *Charter*, as supporting the importance of restricting hate propaganda (*Taylor, supra*, at 917-21). Again, much of the same material was before me. In her minority judgement, McLachlin J. also had little difficulty characterizing the legislative objective of s. 13(1) as pressing and substantial. She also based her

conclusion on the express statement of purpose in s. 2 of the *Canadian Human Rights Act*. She described the objective of s. 13(1) in the following terms (*Taylor, supra*, at 958):

...to discourage discrimination against groups traditionally discriminated against -- discrimination calculated to result in loss of opportunity, loss of respect, and in extreme cases, violence against persons who are members of those groups. More positively, s. 13(1) may be viewed as aimed at enhancing and protecting group cultural identity and hence furthering the multicultural heritage in Canada to which the *Charter* gives express recognition. ... Section 13(1) seeks to achieve these broad purposes in the context of federally regulated telephone services. Viewed globally, the purposes of s. 13(1) may be summed up in the phrase I used in *Keegstra* -- to promote social harmony and individual dignity.

Counsel for the Attorney General submitted that the legislative objective underlying s. 7(1)(b) of the *Code* is similarly informed by the purposes of the *Code* as a whole which are set out in s. 3. She described the objective of s. 7(1)(b) as preventing the harms associated with hate speech and discouraging this kind of discrimination. She said this legislative objective was very similar to that in *Taylor* and that, given the jurisprudence (to which I have referred above), "[t]hat this objective is pressing and substantial must now be taken as axiomatic in our society." I agree. In light of the jurisprudence, it is not seriously open to question that the legislative objective of s. 7(1)(b), which is to prevent and reduce the well-recognized harms associated with the public manifestation of hateful or contemptuous expression against vulnerable persons or groups, is pressing and substantial.

If I am wrong in reaching this conclusion on the basis of the jurisprudence alone, I find that the evidence was sufficient to establish it. As I have mentioned, most of the various reports and international documents referred to in *Taylor* were also in evidence before me. In addition, the testimony of Professor Weinfeld and of Professor Mahoney was relevant and helpful. I find, on the basis of Professor Weinfeld's expert evidence, that racism, including racist speech, and the harm it produces has been and continues to be a cyclical social problem in British Columbia, and elsewhere. On the basis of Professor Mahoney's expert evidence, I find that hateful expression, including anti-Semitism, and the harm engendered by it has been and continues to be a matter of

serious concern in the international community which has inspired restrictions such as those found in Article 4 of the *International Covenant on the Elimination of Racial Discrimination*. The Hansard record of the legislative debates which preceded the enactment of s. 7(1)(b) (see British Columbia, Legislative Assembly, *Debates and Proceedings*, v. 10B at 6887 (7 June 1993); v. 11 at 7056-73 (10 June 1993), 7338-47 (16 June 1993), 7370-431 (17 June 1993), 7648-79 (22 June 1993)) also supports this conclusion, as does the evidence of Ann Bozoian, the senior government official who drafted the Cabinet submission that resulted in the enactment of the legislation in issue.

In passing, I note that the Respondents and Press Council disputed at considerable length the accuracy and relevancy of the various documented incidents of racism to which Ms. Bozoian referred, in order to demonstrate that the government had no evidence of an urgent need to curb hate speech in the "mainstream press." Counsel for the Respondents also emphasized that Mr. Renshaw, editor of the Respondent newspaper, had testified that, in his opinion, "hate was not a problem" on the North Shore. As I have already indicated, this misconceives the nature of the inquiry at the first stage of the *Oakes* analysis. What is required is a consideration of the legislative objective in general terms, not scientific proof that in every detail the precise reach of the infringing measure was urgently required. To the extent that it is relevant, I find the evidence of Mr. Renshaw is not probative of the mischief or harms s. 7(1)(b) was enacted to address.

In summary, I find that the legislative objective of s. 7(1)(b), which is to prevent and reduce the well-recognized harmful effects of the public manifestation of hateful or contemptuous expression against disadvantaged groups, is clearly pressing and substantial. I arrive at this conclusion based on the jurisprudence and on the evidence adduced in the present complaint.

4. Rational Connection

The rational connection requirement is the first of three tests of proportionality. Unlike the assessment of the legislative objective underlying the measure in issue, the proportionality analysis

asks whether the measure the government has chosen to achieve its objective has been crafted with sufficient precision to be a reasonable and demonstrably justified limit on the constitutional right in question. The proportionality enquiry generally entails a more rigorous analysis than does the assessment of the legislative objective; for this reason, the level of scrutiny that is brought to bear on the measure may be very important. In the present case, I have found that a less searching level of scrutiny is appropriate, one that is comparable to that used by the majority of the Supreme Court of Canada in *Taylor*.

The rational connection requirement was described by McLachlin J. in *RJR-MacDonald*, *supra*, at 339:

[The government] must show a causal connection between the infringement and the benefit sought on the basis of reason or logic. To put it another way, the government must show that the restriction on rights serves the intended purpose. This must be demonstrated on a balance of probabilities.

McLachlin J. went on to consider how this causal connection must be demonstrated. In some cases, it may be demonstrated as a matter of scientific proof. But in others, where "the legislation is directed at changing human behaviour", causation may not be scientifically measurable, and a rational connection may be found on the basis of reason or logic (*RJR-MacDonald*, *supra*, at 339-40). The examples McLachlin J. gave of these latter situations are *Keegstra* and *Butler*, both of which concerned the link between expression and harm. In *Canadian Broadcasting Corp.*, *supra*, at 506-7, the Court indicated that a "common-sense analysis" may be sufficient to satisfy the rational connection test.

It is important to emphasize that the rational connection test is one of three analytically distinct assessments of proportionality. It is concerned with the relationship between the chosen measure and the legislative objective; it is a preliminary or general assessment of lack of arbitrariness and seeks evidence of care in the design of the legislative measure: *Taylor*, *supra*, at 925 *per* Dickson C.J. It is neither an enquiry into possible alternatives to the measure chosen, which occurs under the second test, nor does it require a detailed examination of the effectiveness of the measure,

which is considered under the third test. A rational connection will not be established if the measure is irrational in its effect, that is, it is unlikely to achieve the legislative objective or runs counter to it: *Keegstra, supra*, at 851-2 per McLachlin J.; *Taylor, supra*, at 960 per McLachlin J.

Section 7(1)(b) of the *Code* seeks to prevent and remedy harms arising from hateful or contemptuous public communications by suppressing hateful or contemptuous messages which are likely to expose members of the target group to further hatred or contempt. As I have interpreted it, the legislative measure is aimed directly at restricting those expressions which are likely to produce the harm of subjecting members of a vulnerable group to an increased risk of exposure to hateful or contemptuous expressions or activities. The remedies for a violation of s. 7(1)(b) are explicitly aimed at preventing further harm and compensating for harm that has been done. Section 37(2)(a) requires that where a complaint is found to be justified, the transgressor must be ordered to cease the contravention of the *Code* and to refrain from committing the same or a similar contravention; ss. 37(2)(b) - (d) set out a number of permissible compensatory orders.

As is the case with obscenity or hate propaganda in the *Criminal Code* sense, the causal link between the expression restricted by s. 7(1)(b) and the harm it thereby seeks to prevent is not scientifically measurable. Indeed, the legislation recognizes this by not requiring proof of actual harm. In my view, the causal link is as at least as apparent in the case of s. 7(1)(b) as it was found to be by the majority of the Court in *Keegstra, supra*, at 767-71, and *Taylor, supra*, at 923-6. As I have indicated, I do not believe that it is open to me to dispute the well-established jurisprudence that expression can harm. In particular, it is clear that hateful expressions produce both individual and societal harms that are inconsistent with the goals of human rights laws (see generally, *Keegstra, Taylor, Ross*). The arguments advanced by those challenging the legislation were that it fails the rational connection test because it tends to create "martyrs"; it makes hate more persuasive because of public suspicion of government censorship; and that, drawing on the German experience in the 1920s, such restrictions are ineffective. These are precisely the same arguments that were made and rejected in relation to rational connection in *Keegstra* and *Taylor*.

No reason was given to distinguish the present case from these authorities, other than the proposition that they were wrongly decided.

In *Taylor*, even McLachlin J., who would have found that s. 13(1) of the *Canadian Human Rights Act* failed the rational connection requirement, acknowledged that "human rights procedures for enforcement and the absence of the defense of truth may considerably lessen the danger of a counter-productive effect" (*Taylor, supra*, at 961; see also 964). In relation to rational connection, McLachlin J. was concerned that s. 13(1) "catches much expression which presents little threat of fostering hatred of groups or discrimination" (*Taylor, supra*, at 961). She considered the terms "hatred" and "contempt" to be "vague and emotive". She said that the absence of any requirement of foreseeability or intent that the expression expose target group members to hatred or contempt, or proof that it actually did so, meant that the measure so exceeded the scope of the legislative objective that it was not rationally connected to it (*Taylor, supra*, at 961-2). This problem of overbreadth could not be cured by relying on administrative discretion in respect of the investigation and referral of complaints not to enforce the overbroad aspects of the provision (*Taylor, supra*, at 963-4).

As I have said, I believe that the judgment of the majority of the Supreme Court in *Keegstra* and *Taylor* on rational connection compels the conclusion that s. 7(1)(b) of the *Code* is similarly rationally connected to the legislative objective. However, in my view, there are also features of s. 7(1)(b) that partially address McLachlin J.'s concerns about rational connection in *Taylor*. I agree that it is constitutionally insufficient to rely on administrative discretion to ensure that an overbroad provision is not allowed to actually have an overbroad effect. As I have interpreted it, however, I believe that s. 7(1)(b) is not overbroad in the sense of irrationally exceeding its legislative objective. First, s. 7(1)(b) only catches messages that themselves express hatred or contempt, judged on a reasonable person standard. It is not clear that such a finding is required under s. 13(1). Second, "likely to expose" in s. 7(1)(b) of the *Code* requires an objective judgment about the likely effect of the message. A tribunal must be able to conclude that the probable effect of the communication is to legitimate or increase the likelihood of the

manifestation of hatred or contempt, before a s. 7(1)(b) complaint can be found to be justified. This standard is significantly more stringent than the enquiry into whether even the most malevolent or unthinking listener would be likely to be persuaded by the message to express hatred or contempt which is the standard that has been applied in respect of s. 13(1) of the *Canadian Human Rights Act*. In my view, the focus of s. 7(1)(b) on the climate created by the communication in issue is not dissimilar to the situation in *Ross*, where the entire Court found a rational connection between the extra-curricular speech and activities of Mr. Ross and the creation of a "poisoned environment" within the public school system (at 881).

Section 7(1)(b) contains no intent requirement, nor does it require any proof of actual harm. Consistent with the focus of human rights laws in general, the provision is concerned with the impact of the message on members of vulnerable groups, not the intent of the author. I find that the measure is rationally connected to its legislative objective.

5. Minimal Impairment

The minimal impairment test of proportionality requires that the legislative measure impair the *Charter* right in question as little as reasonably possible. The most recent authoritative description of this test is found in Madam Justice McLachlin's majority decision in *RJR-MacDonald*, *supra*, at 342 (followed in *Ross*, *supra*, at 882-4; *Canadian Broadcasting Corp.*, *supra*, at 509):

As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement...

The issue to be decided in relation to the minimal impairment requirement is whether the legislature's choice of measure falls within a range of reasonably infringing alternatives. In respect

of any suggested alternative measure, the decision-maker must ask both whether the alternative would achieve the legislative objective to a substantially similar degree as the measure chosen and whether the alternative is significantly less infringing. Only if it can be said that there is an alternative measure that is equally effective in achieving the pressing and substantial objective and intrudes significantly less on the *Charter* right must the government explain why this alternative was not chosen (*RJR-MacDonald*, *supra*, at 343). The kind of explanation which might justify the government's choice of a more restrictive measure was described in *Keegstra*, *supra*, at 785:

...the government may legitimately employ a more restrictive measure, either alone or as part of a larger programme of action, if that measure is not redundant, furthering the objective in ways that alternative responses could not, and is in all other respects proportionate to a valid s. 1 aim.

How carefully ought the legislative measure in question to be scrutinized and, in particular, what evidence must the government adduce to support its choice and to demonstrate the absence or inappropriateness of possible alternatives? The Press Council and BCCLA rely on the reasoning in *RJR-MacDonald* in support of their position that the government is required to adduce evidence establishing that it made "serious efforts" to consider less infringing alternatives to s. 7(1)(b). The Press Council argues that the government's refusal to disclose information sought by the Press Council about what options were considered when the measure was drafted, and its reliance on the Cabinet, policy and solicitor-client exemptions in ss. 12, 13 and 14 of the *Freedom of Information and Privacy Act*, R.S.B.C. 1996, c. 165 to shield this information from disclosure, merit the same kind of censure and adverse inference that were made in respect of the federal government's actions in *RJR-MacDonald*. Counsel for the Attorney General takes the position that *RJR-MacDonald* is distinguishable. She says the legislative measure in that case was a total, not a partial, ban on expression; the requirement to adduce evidence of lesser alternatives only arises where the measure comprises a total ban, whereas s. 7(1)(b) is a partial ban. Further, she says that such evidence need only be adduced where some significantly less restrictive but equally effective alternative has actually been identified, and there is no such alternative here.

In order to resolve this issue, it is necessary to examine closely the reasoning of the majority in *RJR-MacDonald*. After summarizing the nature of the "minimal impairment" assessment of proportionality to which I have referred above, McLachlin J. characterized the measure in issue as a complete ban on advertising of Canadian tobacco products. She then stated (*RJR-MacDonald*, *supra*, at 343-4):

As this Court has observed before, it will be more difficult to justify a complete ban on a form of expression than a partial ban... The distinction between a total ban on expression, as in *Ford* where the legislation at issue required commercial signs to be exclusively in French, and a partial ban, such as that at issue in *Irwin Toy*, *supra*, is relevant to the margin of appreciation which may be allowed the government under the minimal impairment step of the analysis. ... A full prohibition will only be constitutionally acceptable under the minimal impairment stage of the analysis where the government can show that only a full prohibition will enable it to achieve its objective. Where, as here, no evidence is adduced to show that a partial ban would be less effective than a total ban, the justification required by s. 1 to save the violation of free speech is not established.

McLachlin J. then identified several less restrictive alternatives to the chosen measure, including a ban which would have permitted "informational and brand preference advertising" and a ban on only "lifestyle" advertising, both of which she characterized as partial (*RJR-MacDonald*, *supra*, at 344). She noted that the government "presented no evidence in defence of the total ban, no evidence comparing its effects to less invasive bans." It is in this context that she criticized the government's reliance on s. 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, as amended, to withhold a study of alternatives to a total ban, as well as some 500 other documents which were sought at trial, and made the adverse inference referred to by the Press Council (*RJR-MacDonald*, *supra*, at 345):

In the face of this behaviour, one is hard-pressed not to infer that the results of the studies must undercut the government's claim that a less invasive ban would not have produced an equally salutary result.

McLachlin J. criticized the federal Attorney General for merely asserting that the government had balanced the competing interests in enacting the measure in issue. She said that "Parliament does

not have the right to determine unilaterally the limits of its intrusion on the rights and freedoms guaranteed by the *Charter*." (*RJR-MacDonald*, *supra*, at 346.) Allowing the federal Attorney General to present no evidence and no argument in support of a total over a partial ban would seriously compromise the justification required under s. 1 of the *Charter*. Further, she found that a lowered level of scrutiny, based on factors such as the importance of the legislative objectives, the kind of expression in issue, and context, together with the evidence that the government did adduce in support of the total ban, could not cure the complete absence of evidence demonstrating the inappropriateness of a partial ban as an alternative to a total ban (*RJR-MacDonald*, *supra*, at 346-7).

Applying the reasoning in *RJR-MacDonald* to the present case, it is first necessary to consider whether the restriction on expression in s. 7(1)(b) is total or partial. While the distinction between total and partial bans seems obvious in some cases, it is not always so easy to apply. The difficulty arises when the expression can plausibly be characterized in terms of the restriction on the expression. For example, in *RJR-MacDonald*, McLachlin J. indicated that a ban on all "lifestyle" advertising would have been partial rather than total. However, such a ban could have been described as a "total" ban on lifestyle advertising. Similarly, the ban on all advertising directed at children under thirteen, which included an extremely narrow exemption, that was in issue in *Irwin Toy* was characterized as partial both by McLachlin J. in *RJR-MacDonald*, *supra*, at 344, and by Iacobucci J. in *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084 at 1105-6, who described it as "substantial content-based restrictions (as opposed to a total ban)". In contrast to these examples of partial bans, McLachlin J. characterized the prohibition on tobacco advertising in *RJR-MacDonald* as a total ban on advertising Canadian products rather than a partial ban on advertising tobacco with a narrow exemption for foreign advertising of foreign tobacco products. The ban on all languages other than French on commercial signs was characterized as a total ban in *Ford* rather than a partial ban which did not extend to non-commercial signs.

In light of these various examples of total and partial bans, I find that it is more plausible to characterize the restriction in s. 7(1)(b) of the *Code* as partial rather than total. There is no

question that it is, to borrow the words of Iacobucci J., a substantial, content-based restriction. However, it is not a complete ban on speech critical of vulnerable groups, or on all hate speech. Only hateful or contemptuous expressions which are also likely to expose others to an increased risk of additional hateful or contemptuous expression or activity are prohibited. And only such expression that is aimed at a person or group because of certain grounds (namely, race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age) is prohibited. Thus, s. 7(1)(b) does not in any way restrict hateful expressions that are likely to expose, for example, politicians or academics, to hatred or contempt, because of their political affiliations or their jobs. Section 7(1)(b) does not prohibit the free discussion of any subject; it does, however, restrict the manner of discussion to preclude the expression of views that are so extreme as to be both hateful or contemptuous of disadvantaged persons or groups and likely to expose such persons or groups to further manifestations of hatred or contempt.

What is the effect of this conclusion on the relevance of *RJR-MacDonald* to the level of scrutiny and the evidence required in relation to minimal impairment? McLachlin J.'s reasoning on these matters was clearly in the context of assessing a total rather than a partial ban. In my view, the heightened level of scrutiny of the chosen measure to which she refers only applies to situations where there is a total ban. Where, as here, there is a partial ban and there are other factors justifying a lowered level of scrutiny, including the nature of the infringement and the context, a lowered level of scrutiny continues to be appropriate. This approach is consistent with that taken in *Keegstra*, *Taylor* and *Ross*, as well as in commercial expression cases such as *Irwin Toy* and *Rocket v. Royal College of Dental Surgeons* [1990] 2 S.C.R. 232. It follows that, unlike *RJR-MacDonald*, a lowered level of scrutiny should be applied to the assessment of s. 7(1)(b) of the *Code* under the minimal impairment test.

With respect to the evidentiary burden on government, in the case of a total ban, it is logical to assume that a partial ban would always be a significantly less intrusive alternative. There is therefore an obligation on government to show why a partial ban would not be equally effective

in achieving the legislative objective. Evidence may be an important part of, even critical to, this demonstration. The existence of a significantly less intrusive alternative is not as readily apparent when the measure chosen is a partial ban. However, I cannot accept the submission of the Attorney General that in every case of a partial ban the government has no obligation to adduce evidence that there are no significantly less intrusive and equally effective alternatives to the measure chosen. I think that the clear implication of *RJR-MacDonald* is that government may be required to adduce such evidence in some cases. In the case of a partial ban, if an apparently significantly less restrictive and equally effective alternative is identified, the government must convince the decision-maker that it is not in fact less restrictive or as effective, or that the chosen measure is superior in the sense described in *Keegstra* in the passage quoted above (*Keegstra*, *supra*, at 785).

A consideration of the two recent and unanimous decisions of the Court in *Eldridge* and *Libman* supports this conclusion. In *Eldridge*, a case under s. 15 of the *Charter*, the Court sharply criticized the government's failure to adduce evidence "to demonstrate that it had a reasonable basis for concluding that a total denial of medical interpretation services for the deaf constituted a minimum impairment of their rights" (*Eldridge*, *supra*, at para. 87; see generally paras. 86-92). In *Libman*, the restrictions on third party spending in Quebec's referendum law were held to amount to a total ban. However, the Court expressly stated that scientific proof of less restrictive alternatives was not required. Quoting a passage from *RJR-MacDonald*, the Court held that the minimum impairment requirement can be established on the basis of "the application of common sense to what is known." (*Libman*, *supra*, at para. 39.)

To summarize, although evidence may not *always* be required under the minimal impairment test, particularly in the case of a partial ban, since it is possible that the government might justify the measure on the basis of argument ("the application of common sense") alone, this may be a risky strategy in light of the comments in *RJR-MacDonald* and *Eldridge*. It is, of course, up to counsel for the Attorney General to determine what evidence to present, including whether to claim various privileges to shield potentially relevant information from disclosure. But if an apparently

significantly less intrusive and equally effective alternative to the legislative provision is identified, the absence of any cogent demonstration of the unacceptableness of the alternative may well be fatal to the constitutionality of the legislation, whether it creates a total or a partial ban.

Bearing in mind the lowered level of scrutiny and the twin requirements for any proposed alternative to s. 7(1)(b), namely, that it intrude significantly less on freedom of expression and that it be equally effective to achieve the legislative goal of preventing and reducing the harms associated with the public manifestation of hateful or contemptuous expression against disadvantaged groups, I will now consider the arguments that the provision is not minimally impairing.

Those challenging the constitutional validity of the legislation advanced three sets of arguments that s. 7(1)(b) does not impair freedom of expression as little as reasonably possible. First, they took issue not with the substance of s. 7(1)(b) itself, but with the legislature's decision to enact such a restriction on freedom of expression within a human rights code, pointing to a series of alleged deficiencies in the human rights regime. Second, and closely related to the first set of arguments, was the submission that the decision whether a communication violates the standard in s. 7(1)(b) should be made by a decision-maker that enjoys at least as much independence from government as a s. 96 court. The third set of arguments focused on the substantive measure itself, arguing that it was not minimally impairing first, because less restrictive alternatives than the *Code* provision can be found in other legal and non-legal approaches to the problem of hate speech, and second, because there are less restrictive alternatives within the scheme of the *Code*.

a. Sufficiency of Human Rights Procedures

The Respondents and the Press Council pointed to a catalogue of alleged deficiencies in the procedure for resolving s. 7(1)(b) complaints under the *Code*. Many of these submissions rested upon the assumption that the mere fact of any departure from the procedures for resolving

defamation actions through the civil justice system would be sufficient to render the *Code's* procedures and s. 7(1)(b) unconstitutional. Thus, rather than advancing a constitutional argument that shows how a particular procedure results in a greater infringement of the *Charter*, the Respondents and the Press Council, for the most part, simply asserted that various differences exist between the procedures governing adjudication of a defamation action and a s. 7(1)(b) complaint. Many of these differences flow from the differences between administrative law procedures and civil law procedures. For example, there is no right to trial by jury under s. 7(1)(b), there are no civil pleadings, there is no compulsory examination for discovery nor pre-trial discovery of documents, there is no provision of recovery of costs for a successful respondent, there is judicial review rather than a right of appeal, and the rules of evidence are relevant but not binding on a Tribunal. These are all very common differences between administrative law and civil law approaches to decision-making. These deficiencies were characterized by the Respondents as "an utter absence of procedure." However, they are more properly seen as a legislative preference for a well-established administrative law procedure over civil trial procedure. What is absent from the submissions is any developed demonstration on the basis of reason or authority that an administrative law approach to the resolution of s. 7(1)(b) complaints leads to a significantly greater infringement of freedom of expression than the civil trial process. Such an argument would have to address, for example, the sufficiency of the investigation process (which includes the preparation of an investigation report that is disclosed to the parties with an opportunity to file responses) that is an important part of the pre-hearing practice under the *Code* and would seem to serve purposes similar to the procedures for pre-trial discovery in a civil action. In any event, the mere fact that the legislature has enacted s. 7(1)(b) in an administrative scheme rather than creating a statutory cause of action to be adjudicated by a civil court is constitutionally irrelevant.

My rejection of these submissions finds support in the fact that the courts have repeatedly praised the administrative law approach as being particularly appropriate for the resolution of human rights disputes. For example, in *Taylor, supra*, at 917, Dickson C.J. said:

The aim of human rights legislation, and of s. 13(1) [of the *Canadian Human Rights Act*], is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim.

Although he was contrasting the administrative process with the criminal process in this passage, a similar comparison can be made between the civil and administrative process in terms of such features as accessibility and expense. In her dissenting judgment, McLachlin J. also praised the human rights process (*Taylor, supra*, at 963-4). This suggests to me that, far from being constitutionally inadequate, the choice of the administrative law procedures generally found in human rights legislation over those in the civil system may be constitutionally preferable, particularly when the guarantee of freedom of expression is engaged.

The Respondents also argued that the costs of responding to a s. 7(1)(b) complaint were excessive because "many publishers will wish to rely upon the *Charter*". They said that the chilling effect of excessive cost was exacerbated because complainants receive Legal Aid funding for their representation but respondents do not, and both the Attorney General and the Deputy Chief Commissioner may intervene in such cases. These arguments confuse the decision to mount a constitutional challenge to the legislation with the resolution of the merits of complaints under the section. They also incorrectly encompass other legislation in a challenge to the constitutionality of s. 7(1)(b) of the *Code*. A constitutional challenge to any legislative provision is always both costly and time-consuming. However, in no way can this fact be used to support the constitutional inadequacy of the legislation itself. If that were the case, any law could be said not to be minimally impairing because someone chose to challenge it. Further, I do not understand the assertion that the *Charter* will always be involved in the resolution of s. 7(1)(b) complaints. Once it has been finally determined whether or not the legislation is constitutionally valid, the constitutional issue will be settled.

With respect to the other arguments, the Legal Aid scheme of funding is independent of the *Code*, as is the legislation which authorizes the Attorney General to intervene when the constitutionality of any law is challenged. I cannot see how these independent legal regimes bear on the question of whether s. 7(1)(b) is minimally impairing. Any constitutional deficiency in those regimes is surely addressed by challenging them, not by invalidating s. 7(1)(b). It is true that, pursuant to s. 36 of the *Code*, the Deputy Chief Commissioner has the right to be added as a party at the hearing of any complaint. However, the Respondents seem to assume that such an intervention will always be on the side of the Complainant. There is no basis in the legislation for such an assumption. Absent such a demonstration, it cannot be said that the potential participation of the Deputy Chief Commissioner increases the degree of infringement. In the present case, I note that the Deputy Chief Commissioner restricted his participation to the constitutional issue, and took no position on the merits of the complaint.

Counsel for the Respondent also argued that the delay between the time a complaint is filed and the time it proceeds to hearing means that s. 7(1)(b) is not minimally impairing. He relied on the conclusion in the *Report on Human Rights in British Columbia* (Vancouver: Ministry Responsible Sfor Multiculturalism and Human Rights, 1994) (Chair: W. Black)) at p. 142, that the average time for resolution of a human rights complaint was three years. It is not clear whether the submission was that this length of time is constitutionally insupportable in an absolute sense, or that some alternative method of resolving s. 7(1)(b) complaints would be speedier. In any event, since the Respondents abandoned any argument about the constitutionality of the administration of their complaint, an argument about delay must concern delay attributable to the legislation itself. No argument was made that the three year time period that Professor Black found to be the norm under the former *Act* has or will continue under the *Code*, nor that the delay is a product of the legislation itself rather than, for example, a resource issue.

Counsel for the Respondents also argued that the lack of specialized training for human rights personnel who investigate s. 7(1)(b) complaints leads to a lack of minimal impairment. Again, since this is not precluded by the *Code*, I must assume that the argument is that the failure to

legislatively mandate specialized training for s.7(1)(b) investigations makes the legislation not minimally impairing. I disagree. Specialized training of those who investigate human rights complaints is obviously desirable. However, it is far from apparent that s. 7(1)(b) investigations are more complex or challenging than the investigation of complaints under other provisions of the *Code* which may also involve freedom of expression concerns. (For an example of such a case, see *Ross*, which was a complaint about discrimination in the provision of a public service.) It is important not to confuse the complexity of the constitutional challenge in this case with the ordinary investigation of a complaint. In any event, I find that the failure to legislatively require special training for human rights investigators, even if it could be said to be constitutionally preferable, certainly would fall within the “range of reasonable alternatives” to the measure chosen. The absence of such a provision does not seriously increase the degree to which s. 7(1)(b) infringes s. 2(b) of the *Charter* for purposes of the minimal impairment analysis.

The Press Council asserted that the remedies available when a complaint is found justified under s. 7(1)(b) mean that s. 7(1)(b) is not minimally impairing. In particular, counsel pointed to the absence of a statutory cap on the amount which may be awarded for compensation for “injury to dignity, feelings and self-respect” under s. 37(2)(d)(iii) and the order required under s. 37(2)(a) that, upon finding a complaint justified, the person who contravened the *Code* must be ordered to cease the contravention and to refrain from committing the same or a similar contravention. Again, no authority or argument supported these claims. I have already addressed the compensatory nature of the s. 37(2)(d)(iii) remedy in relation to the division of powers argument that the absence of a cap means that the legislation is criminal law. Given the many comparisons drawn by the Press Council to defamation law, I find its submission about the absence of a cap on monetary compensation curious, since there is no cap on damages in a defamation action. In any event, these two remedial provisions seem to me to be precisely the kind of well-tailored and responsive remedy that is the hallmark of a human rights/administrative law procedure praised by Dickson C.J. in *Taylor, supra*, at 917. Without any argument to assist me, I cannot see how they increase the degree of infringement of s. 2(b) of the *Charter*.

Two further claims were asserted but not developed. First, the Press Council contended that the powers granted to the Commissioner of Investigation and Mediation over the investigation of the complaint will be exercised in an ideologically biased way. There is no evidence or argument to support this. Second, the Respondents claimed that there was no mediation of the present complaint. The statute permits mediation of complaints in s. 29. The fact that mediation did not occur in this complaint is irrelevant, given that the Respondents abandoned their "unconstitutional administration" argument.

b. Independence of Tribunal

Closely related to the arguments I have just addressed about the procedures for resolution of s. 7(1)(b) complaints, is the argument advanced by the Press Council that s. 7(1)(b) is not minimally impairing of freedom of expression because complaints brought under this section are determined by an administrative tribunal and not a s. 96 court judge.

The argument that was advanced was not that the nature of the decision required under s. 7(1)(b) trenches on the exclusive jurisdiction of s. 96 courts. This was made quite clear during oral submissions. Rather, what was asserted is that when freedom of expression is in issue, as it will always be in a s. 7(1)(b) complaint, the fact that the complaint is heard by a Tribunal member infringes s. 2(b) of the *Charter* to a significantly greater degree than necessary because administrative adjudicators lack the independence of s. 96 court judges. Two indicia of independence were referred to, namely, security of tenure and financial security.

In its written submissions, the Press Council described the degree of independence enjoyed by superior court judges under s. 96 of the *Constitution Act*, by Provincial Court judges (see *Craig v. The Queen* (12 June 1997) Vancouver A943590 (B.C.S.C.)), by the Freedom of Information and Privacy Commissioner in B.C., and by members of the federal Human Rights Commission. The description shows that varying degrees of independence are enjoyed by different kinds of

adjudicators. The Press Council then asserted, "it seems clear that the Human Rights Tribunal does not enjoy appropriate independence from the Executive." Again, the assumption is made that pointing to differences between the degree of independence provided for in the *Code* and other provisions for the independence of other adjudicators is a complete constitutional argument. It is not. What is missing is any argument or authority which demonstrates what the minimal constitutional standard for the independence of adjudicators ought to be in this context, namely, hearing human rights complaints involving freedom of expression. In what way does having a s. 7(1)(b) complaint heard by a tribunal which is appointed by the Lieutenant Governor in Council for a fixed term (with one permitted reappointment) and whose remuneration is fixed by Order-in-Council impair freedom of expression more than is reasonably necessary?

It is obvious that a human rights tribunal does not enjoy the same degree of independence as a s. 96 court judge. Absent any argument demonstrating that this highest standard of independence is required when freedom of expression values are engaged in the context of s. 7(1)(b), I believe I should assume that if the Tribunal enjoys the degree of independence generally required for administrative tribunals it will not excessively impair freedom of expression.

Counsel for the Deputy Chief Commissioner submitted that any argument about the lack of independence of the Tribunal ought to have been raised in an application for judicial review as a free-standing challenge to the jurisdiction of the Tribunal. In the alternative, if this argument can be advanced under the minimal impairment test in s. 1 of the *Charter*, she argued that the essential conditions of judicial independence, which also apply to administrative tribunals, were satisfied. She said:

Like provincial court judges, members of administrative tribunals are not entitled to the same standard of security of tenure and financial security as superior court judges. The *Valente* principles must be considered in light of the nature of the tribunal, the interests at stake and other indices of independence to determine whether a reasonable and right-minded person, viewing the whole procedure as set out in the legislation, would have a reasonable apprehension of bias on [the] basis that the members of the tribunal are not independent.

In addition to *Valente v. The Queen*, [1985] 2 S.C.R. 673, she relied on *C.P. Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 and 2747-3174 *Québec Inc. v. Régie des permis d'alcool*, [1996] 3 S.C.R. 919 which provide ample support for the above submission.

I agree that this argument is properly mounted as an independent challenge to the jurisdiction of the tribunal and should not be subsumed under the minimal impairment branch of s. 1 of the *Charter*. If the provisions for financial security or security of tenure of Tribunal members were found to be insufficient, the most appropriate remedy would be directed at those portions of the *Code* rather than leaving them intact and invalidating s. 7(1)(b).

However, assuming that the independence argument can properly be raised under the minimal impairment test, and that s. 7(1)(b) could properly be found not to be minimally impairing of freedom of expression if the Tribunal hearing the complaint lacks either security of tenure or financial security, I find that the provision for these aspects of independence in respect of the B.C. Human Rights Tribunal is adequate. That administrative tribunals are not to be held to the same standard of independence as superior courts has been conclusively decided: *C.P. Ltd.*, *supra*, at 51; 2747-3174 *Quebec Inc.*, *supra*, at 961-2. With respect to security of tenure, administrative adjudicators may hold fixed term appointments, although it may not be possible to provide that they are removable at pleasure. In 2747-3174 *Quebec Inc.*, the Court interpreted s. 23 of Quebec's *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, as amended, which guarantees the right of every citizen to a public and fair hearing by an independent and impartial tribunal, including quasi-judicial tribunals. The Court found that a fixed term appointment, with stipulated grounds for removal and a provision for re-appointment, satisfied the requirement of security of tenure, but that a provision which would have allowed the directors of the Liquor Licencing Commission to be removed at pleasure would not have been acceptable (2747-3174 *Quebec Inc.*, *supra*, at 964).

Section 31 of the *Code* provides for fixed-term appointments; it does not authorize the Executive to remove Tribunal members at pleasure. It is true that the Freedom of Information and Privacy

Commissioner enjoys greater security of tenure than tribunal members. However, unlike Tribunal members, he is an Officer of the Legislature whose work is focused exclusively on government. It does not follow from the fact that members of the Canadian Human Rights Commission are only removable on joint address of the Senate and Commons that this is a minimum requirement for all human rights tribunals. Even members of the federal human rights tribunal do not enjoy this degree of security of tenure: see *Canadian Human Rights Act*, s. 48.2. The provisions for security of tenure and financial security in the *Code* are more typical: see, for example, *Human Rights Code*, S.M. 1987, c. 45, C.C.S.M., c. H175, s. 8; *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7, as amended, ss. 1, 23. Frequently, those who adjudicate human rights complaints are members of boards of inquiry which are appointed on an *ad hoc* basis by the Minister: see, for example, *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, as amended, s. 25; *Human Rights Code*, R.S.N.B. 1973, c. H-11, as amended, s. 20; *Human Rights Code*, R.S.O. 1990, c. H. 19, as amended, s. 35. It was not suggested to me that such appointments fail to provide sufficient security of tenure.

With respect to financial security, the remuneration of tribunal members is required by s. 32 of the *Code* to be set by the Lieutenant Governor in Council. In contrast, the provision for remuneration in *C.P. Ltd.*, which was found to be insufficient, was purely permissive: adjudicators could be paid any "reasonable" amount or even not at all. Further, in 2747-3174 *Quebec Inc.*, the Court held that the fact that a Minister is ultimately responsible for the tribunal does not create a lack of independence where adjudicators exercise control over both the judicial function and over the administrative decisions that bear upon the judicial function (2747-3174 *Quebec Inc.*, *supra*, at 965). The Court found that the fact that adjudicators swear an oath of office is also relevant to independence.

In light of these authorities and applying the test stated above, I find that the members of the B.C. Human Rights Tribunal possess sufficient independence to meet the requirements of judicial independence in *Valente*, 2747-3174 *Quebec Inc.*, and *C.P. Ltd.* as they have been applied to administrative tribunals. Since there has been no demonstration that the minimal impairment test

under s. 1 of the *Charter* imports a higher standard where freedom of expression is in issue, the Press Council's submission on this issue must fail.

c. Less Restrictive Alternatives

Those challenging the legislation also argued that s. 7(1)(b) of the *Code* was not minimally impairing because of the existence of approaches to the problem of hate speech other than the *Code*, and because less restrictive alternatives exist within the scheme of the *Code* itself.

With respect to alternatives to the *Code*, it was submitted that ss. 318 and 319 of the *Criminal Code*, the statutory cause of action created by the *Civil Rights Protection Act*, the Press Council's complaint procedure, the opportunity to write letters to the editor, and the fact that the government could implement programs to educate the public about hate speech either make s.7(1)(b) unnecessary or are less restrictive alternatives to it.

The presence of alternative approaches to a complex social problem such as hate speech does not make any particular approach unnecessary (*Butler, supra*, at 508-9). In *Keegstra, supra*, at 784, Dickson C.J. rejected an argument that criminalization was an unnecessary and overly severe response to the problem of hate speech given the availability of non-criminal alternatives. He said:

With respect to the efficacy of criminal legislation in advancing the goals of equality and multicultural tolerance in Canada, I agree that the role of s. 319(2) will be limited. It is important, in my opinion, not to hold any illusions about the ability of this one provision to rid our society of hate propaganda and its associated harms. Indeed, to become overly complacent, forgetting that there are a great many ways in which to address the problem of racial and religious intolerance, could be dangerous. Obviously, a variety of measures need be employed in the quest to achieve such lofty and important goals.

Section 7(1)(b) is clearly one of several approaches, some legislative and some non-legislative, some federal and some provincial, to the problem of hate speech. Given the nature of the problem, as outlined by Chief Justice Dickson, the fact that there are other approaches does not make the *Code* provision unnecessary.

The second argument, that s. 7(1)(b) is not minimally impairing because one or more of the alternative approaches is less restrictive of freedom of expression, must also fail. A brief review of the alternatives suggested reveals that either they are not less infringing of freedom of expression or they are not equally effective to achieve the legislative objective at which s. 7(1)(b) is aimed. Criminalization of expression is clearly more infringing of freedom of expression than regulation through a human rights code: *Keegstra, supra*, 783-4 *per* Dickson C.J., at 861 *per* McLachlin J.

Section 1 of the *Civil Rights Protection Act* creates a statutory cause of action in respect of conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting, *inter alia*, hatred or contempt of a person or class of persons. The action is to be commenced in B.C. Supreme Court; both injunctive relief and damages are available, as are fines and imprisonment. Quite apart from the significant procedural and remedial differences between the two approaches, it is evident from the face of the *Civil Rights Protection Act* provision that it is concerned with a different aspect of the problem of hate speech than s. 7(1)(b) of the *Code*. The statutory cause of action is concerned with the purposes of the author of the communication which promotes hatred; s. 7(1)(b) is concerned with the effects of exposure to hateful expression on the targets of such speech. (See also British Columbia, Legislative Assembly, *Debates and Proceedings*, v. 11 at 7061-62 (10 June 1993)), discussing the differences between the *Civil Rights Protection Act* and Bill 33, which became s. 7(1)(b) of the *Code*.) It is doubtful that the *Civil Rights Protection Act* provision is significantly less infringing of freedom of expression than s. 7(1)(b) of the *Code*. Even if it could be said that it was, it is not equally effective to achieve the objective of s. 7(1)(b) because, although it may catch some of the same expression, it is not aimed at the harmful consequences of the public manifestation of hate speech against disadvantaged groups.

The non-legislative alternatives are clearly less infringing of freedom of expression than s. 7(1)(b), but they are equally clearly less effective to achieve its legislative objective. The Press Council complaint procedures only apply to member newspapers and membership is voluntary. Moreover, members cannot be forced to comply with its "Code of Practice" which states that, unless directly relevant to the story, newspapers should not publish material "likely to encourage discrimination" on grounds similar to those in the *Code* (Ex. 39, Article 13.). The only remedy is publication of the Press Council's decision as to whether or not the publication in issue complied with the Code of Practice (Ex. 40). Letters to the editor are not a substitute for s. 7(1)(b) of the *Code*. Counter-speech is an important and appropriate response to all kinds of offensive expression, but it does not provide a remedy for the harm to target group members of an increased risk of exposure to hate. It is not in any way a substitute for legislative restriction of hate speech. In fact, those challenging the constitutional validity of s. 7(1)(b) oppose a legislative response precisely because it is so different from counter-speech. Moreover, the evidence clearly established that, even in the case of newspapers, there is no certainty that the counter-speech will ever be heard: it is the newspaper, not the author that determines whether a letter to the editor is published (T. May 27, pp. 26-29). The government-funded educational programs and "public information campaigns" advocated by the BCCLA as a lesser alternative to s.7(1)(b) may be important initiatives in the social quest for equality but they cannot be said to be equally effective to achieve the legislative objective of s. 7(1)(b): they are aimed at changing discriminatory attitudes, they do not restrict or remedy the consequences when such attitudes are manifested in public behaviour.

Turning to the less restrictive alternatives that were identified within the scheme of the *Code*, nine such modifications to s. 7(1)(b) were proposed, drawn either from s. 319(2) of the *Criminal Code* or from defamation law. They are:

- the addition of a defense of truth;
- the inclusion of an express guarantee or acknowledgment of freedom of expression;
- the inclusion of an intent requirement;
- the addition of a defense of fair comment or publication in the public interest and for the public benefit;

- the addition of a defense of "genuine artistic, academic, scientific or research purpose";
- the addition of a defense for opinions expressed in good faith on a religious subject;
- the addition of a defense for good faith expressions which point out, for the purpose of removal, "matters producing or tending to produce feelings of hatred";
- the addition of a defense of innocent dissemination; or
- the addition of a defense for reporting on public meetings, court proceedings, and other public proceedings.

Before examining these various alternatives, a preliminary comment is appropriate. In respect of most of these alternatives, the arguments advanced were incomplete. Those advocating the alternative merely outlined instances in which such an element or defense was included in other types of speech restriction, in Canada or other jurisdictions, and asserted that it was less infringing of freedom of expression. No argument was advanced, however, that the alternative proposed was *significantly* less intrusive of freedom of expression rather than one of a reasonable range of alternatives, particularly given the reduced level of scrutiny applicable in the circumstances. Nor was any effort made to show that the alternative was equally effective in achieving the legislative objective.

In my view, the defense of truth, the inclusion of an express statutory reference to freedom of expression, and the requirement of proof of intent on the part of the respondent were all persuasively rejected in *Taylor* as less restrictive alternatives within the meaning of s. 1 of the *Charter*. The requirement of a defense of truth to a human rights prohibition which restricts freedom of expression was conclusively rejected in *Taylor*. Dickson C.J. applied his reasoning in *Keegstra*, which suggested that the *Charter* did not require such a defense even in the more draconian context of criminal legislation, to conclude that it was not required in the case of s. 13(1) of the *Canadian Human Rights Act* (*Taylor, supra*, at 934-6). McLachlin J., in her minority judgment, indicated that the absence of such a defense would not prove fatal to an otherwise acceptable human rights prohibition (*Taylor, supra*, at 966).

Similarly, the lack of an express statutory acknowledgment of freedom of expression was found not to be necessary to the minimal impairment requirement. Although such provisions do appear in some human rights statutes, Dickson C.J. found that they are not constitutionally required because human rights tribunals will always have to interpret provisions which restrict freedom of expression with an eye to the value of that freedom (*Taylor, supra*, at 929-30). McLachlin J. did not find it necessary to address this alternative in her reasons.

The absence of any requirement of proof of intent from s. 13(1) of the *Canadian Human Rights Act* was addressed at some length by both the majority and the minority in *Taylor*, and was a fundamental point of disagreement between them. Dickson C.J., in his majority judgment, acknowledged that the absence of proof of intent does increase the degree of infringement of s. 2(b) of the *Charter*, but found that it is necessary to achieve the legislative objective. He wrote (*Taylor, supra*, at 931-2):

An intent to discriminate is not a precondition of a finding of discrimination under human rights codes... The preoccupation with effects, and not with intent, is readily explicable when one considers that systemic discrimination is much more widespread in our society than is intentional discrimination. To import a subjective intent requirement into human rights provisions, rather than allowing tribunals to focus solely upon effects, would thus defeat one of the primary goals of anti-discrimination statutes.

....
This conflict is perhaps best discussed under the "effects" segment of the *Oakes* proportionality test, for the question is not so much whether the objective of s. 13(1) can be accomplished in a less restrictive way as it is whether the sacrifice required in order to combat successfully discriminatory effects is so severe as to make the impact of s. 13(1) upon the freedom of expression unacceptable. Nevertheless, putting aside this categorizational point, it seems to me that the important Parliamentary objective behind s. 13(1) can only be achieved by ignoring intent, and therefore the minimal impairment requirement of the *Oakes* proportionality test is not transgressed.

In other words, the fact that the pressing and substantial legislative objective is focused exclusively on ameliorating the harmful effects of the restricted expression entails the absence of

a requirement of proof of intent. As I read the reasons of Dickson C.J., any alternative which would require proof of intention would not be equally effective in achieving the legislative objective animating such a provision, and is therefore not a less restrictive alternative within the meaning of the *Oakes* test. It is fundamental to the aims of human rights statutes like the *Code* that the focus of the enquiry not be shifted from the impact on the victim to the intention of the speaker.

In her dissenting reasons, McLachlin J. acknowledged that the absence of an intent requirement was consistent with the remedial focus of human rights legislation; she found, however, that this made the provision constitutionally invalid, particularly given the absence of any requirement of proof that the expression in issue actually produced the effect with which it was concerned (*Taylor, supra*, at 962). In her discussion of the issue, she suggested that "anti-discriminatory" speech might be prohibited by s. 13(1), citing the example of the Canadian Civil Liberties Association's practice of posing on the telephone as an employer seeking to hire only white people in order to uncover discriminatory employment practices. While, as I have indicated, I believe that the majority decision in *Taylor* is persuasive authority that proof of intent is not mandated by the *Charter* in respect of s. 7(1)(b) of the *Code*, it is helpful to an understanding of the scope of the restriction, and relevant to my consideration of the various other alternatives to it, to consider such an example in the context of s. 7(1)(b).

As I understand it, the example captures the problem of well-intentioned expression that "backfires"; that is, speech which is intended to be anti-discriminatory but, when judged objectively, is more likely than not to have the opposite effect. Clearly, expression which actually is anti-discriminatory in effect would not be caught by s. 7(1)(b). Turning to the s. 7(1)(b) enquiry, in order to satisfy the two prongs of the section as I have interpreted it, not only must the well-intentioned expression be judged likely to expose the target group to an increased risk of hatred or contempt, but the expression itself, judged objectively, must be found to be hateful or contemptuous, bearing in mind that those terms signify extreme vilification. Moreover, the assessment of both the meaning and impact of the expression must take into account the whole

context. Not every racist or anti-Semitic utterance will be caught by the section. It is far from clear to me, without more, that stating a preference for or seeking to recruit only white employees, which is indubitably offensive, would violate s. 7(1)(b) although it might well contravene other sections of the *Code*. However, taken in its context, if the preference for whites is expressed in such an extreme fashion as to be hateful or contemptuous in itself and it has the likely effect of increasing the target group's risk of exposure to hatred or contempt by making such expression more acceptable, then, despite the hidden laudable motive of the speaker, it will contravene s. 7(1)(b). In such a case, which I believe will be rare or non-existent, the motive of the speaker is simply too well-hidden for the purposes of human rights law. Section 7(1)(b) does impose some restrictions on the means of accomplishing even anti-discriminatory purposes. Specifically, it prohibits those anti-discriminatory strategies which are themselves hateful and contemptuous of persons or groups on the listed grounds and which have the effect of increasing the likelihood of further victimization. In my view, such anti-discrimination strategies, if they exist, are not only poor, they are necessarily counter-productive. But even if such a strategy is employed, the consequence of finding a violation of s. 7(1)(b) is not a punishment of the speaker. Rather, it is explicitly compensatory. Ordering that the harmful strategy cease and appropriately compensating those injured by it, as provided for in the *Code*, seem to me to be eminently acceptable responses.

Similar considerations apply to the example of the "neutral reporter" which was raised in argument. This example was based on a Danish case heard by the European Court of Human Rights, *Jersild v. Denmark* (1994), Eur. Court H.R. Ser. A, No. 298. It concerned the broadcast of an edited clip of a television reporter's interview with a xenophobic Danish youth group and the liability of the reporter for the expression contained in the broadcast excerpts of the interview. While the provision under which the reporter was charged was criminal and quite different from s. 7(1)(b) of the *Code*, these underlying facts usefully illustrate the problem for the present purpose. Given the narrowness of the restriction on expression in s. 7(1)(b), I believe that its primary effect in this context is to encourage responsible journalism, an objective that is consistent both with the spirit of the anti-discrimination provision in Article 13 of the Press Council's own

Code of Conduct (Ex. 39), and with the provisions governing other media, such as television and radio. For example, s. 5 of the *Television Broadcasting Regulations, 1987 SOR/87-49*, as amended, prohibits licensees from broadcasting, *inter alia*,

any abusive comment or abusive pictorial representation that, when taken in context, tends to or is likely to expose an individual or a group or a class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour religion, sex, sexual orientation, age or mental or physical disability.

See also s. 3 of the *Radio Regulations, 1986 SOR/86-982*, as amended.

The tone and style of the reporting, the difference between news reports and editorial opinion, the public interest and importance of the topic are all relevant aspects of the context in which the s. 7(1)(b) assessment must be made in such a case, as is the fact that the communication appears in a newspaper. When these factors are taken into account along with the content of the expression in issue, I find it hard to conceive of a realistic example of a case where s. 7(1)(b) of the *Code* would preclude reporting on the news. What it does preclude, in my view, is reporting which exploits and sensationalizes hateful or contemptuous views without regard for the impact, not only of what is reported but also of the report itself, on vulnerable groups. In my view, an exemption for the press or for reporting on topics of public interest, whether explicitly intent-based or not, would not be an acceptably less restrictive alternative to s. 7(1)(b) as currently framed. Reporters and the media generally have an enormous amount of control over very influential forums for the dissemination of expression. Decisions are made about what to publish and how to present it throughout the editorial process. Opinions, facts, and opinions mixed with facts are presented. To exempt the press either explicitly or implicitly from the ambit of s. 7(1)(b) would be to presume that reporting is always "neutral", never hateful or contemptuous in the sense encompassed by s. 7(1)(b). It would be to deny the sorry history of incidents of abuses of the power of the press, by both mainstream and non-mainstream publications to which I alluded in my description of the media context, and would undermine the legislative objective of the chosen measure.

With respect to the remaining alternatives, they essentially propose the addition of various defenses all of which concern situations in which the speaker, for some reason, lacks a hateful or contemptuous intention. Thus, given my reading of *Taylor*, that proof of intent is not required for purposes of minimal impairment in the case of a human rights restriction on expression like s. 13(1) of the *Canadian Human Rights Act* or s. 7(1)(b) of the *Code*, it is doubtful that the absence of any of these defenses renders s. 7(1)(b) constitutionally invalid. This is not to say that the legislature could not have chosen to enact one or more of these defenses, thereby narrowing the degree to which s. 7(1)(b) intrudes on freedom of expression. However, it does mean that the decision whether to enact any of these defenses falls within the range of reasonable alternatives to the measure chosen for the purposes of the minimal impairment test so that the fact that no such defenses are available is not fatal to the constitutional validity of the legislation under s. 1.

Moreover, as I have attempted to illustrate in the examples I have discussed, the situations to which these various proposed defenses allude, such as genuine artistic or scientific purpose, good faith religious opinions, fair comment and innocent dissemination, among others, will be an important part of the context in which the communication's meaning and likely impact are assessed. Factors such as these will tend to reduce the likelihood that a reasonable person would find the communication hateful or contemptuous in itself and likely to expose its targets to an increased risk of hatred or contempt. But if, despite the presence of the mitigating context, the expression is objectively judged to be hateful and likely to expose others to further hatred, then the complaint is properly justified. I agree with Dickson C.J. that any alternative which permitted a contrary result would not attain the effects-based human right objective of the provision.

Therefore, I conclude, in light of the applicable level of scrutiny, and the test to be applied, which requires a significantly less intrusive measure that is equally effective in achieving the legislative objective, that no less restrictive alternative to s. 7(1)(b) has been identified. Those which were advanced in argument either fall within the range of reasonable alternatives to the measure chosen, or are not significantly less infringing of freedom of expression, or are not equally effective to attain the legislative objective. That being the case, it is not incumbent on the government to adduce evidence of the inappropriateness of other alternatives. I find that s. 7(1)(b) of the *Code* satisfies the minimal impairment test of the proportionality analysis under s. 1 of the *Charter*.

6. Balancing of Effects

The final assessment of proportionality requires direct consideration of the effects of the legislative measure. While in most cases this has tended to be a fairly cursory analysis, perhaps because it usually follows a careful and lengthy scrutiny of the legislative measure under the minimal impairment branch (see, for example: *Taylor, supra*, at 939-40; *Butler, supra*, at 509; *Irwin Toy, supra*, at 1000), the *Dagenais* decision appears to have refined the inquiry under this aspect of proportionality. The case concerned a challenge to the constitutional validity of a judicial publication ban, not a legislative provision. The Court held that the ban would not be authorized at common law unless it complied with the *Charter*. In the course of his reasons, Lamer C.J. stated (*Dagenais, supra*, at 889):

In my view, characterizing the third part of the second branch of the *Oakes* test as being concerned solely with the balance between the objective and the deleterious effects of a measure rests on too narrow a conception of proportionality. I believe that even if an objective is of sufficient importance, the first two elements of the proportionality test are satisfied, and the deleterious effects are proportional to the objectives, it is still possible that, because of a lack of proportionality between the deleterious effects and the salutary effects, a measure will not be reasonable and demonstrably justified in a free and democratic society. I would, therefore, rephrase the third part of the *Oakes* test as follows: there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures. (Emphasis in original.)

There is some doubt, however, whether a balancing of deleterious and salutary effects is required in every case. The Complainant and Deputy Chief Commissioner argued that it is not, relying on the following passages in *Dagenais, supra*, at 887; see also 888:

In many instances, the imposition of a measure will result in the full, or nearly full, realization of the legislative objective. In these situations, the third step of the proportionality test calls for an examination of the balance that has been struck between the objective in question and the deleterious effects on constitutionally protected rights arising from the means that have been employed to achieve this

objective. At other times, however, the measure at issue, while rationally connected to an important objective, will result in only the partial achievement of this object. In such cases, I believe that the third step of the second branch of the *Oakes* test requires both that the underlying objective of a measure and the salutary effects that actually result from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms. (Emphasis in original.)

The Complainant and Deputy Chief Commissioner pointed to a number of Supreme Court of Canada cases decided after *Dagenais* that did not refer to the case or its reformulation of the third test of proportionality in their application of s. 1 of the *Charter*: see *Ross, Egan, Benner*. (See also *Eldridge*.) They also refer to the dictum of the Court in *Ross, supra*, at 870, that "it may not always be necessary to have resort to the full panoply of tests elaborated in *Oakes*." Thus, these parties submitted that a balancing of deleterious and salutary effects is not always required; it is only necessary where the measure does not substantially achieve the legislative objective. Moreover, they asserted, it is not required in this case, because s. 7(1)(b) of the *Code* does substantially achieve its object.

The Respondents and their supporting intervenors took the position that *Dagenais* requires a balancing of deleterious and salutary effects in all cases and, in any event, it is required in the present case. They referred to *Canadian Broadcasting Corp.*, a constitutional challenge to s. 486(1) of the *Criminal Code*, which grants judges the discretion to exclude the public from the courtroom in certain circumstances. The Court applied the *Dagenais* weighing of deleterious and salutary effects in its assessment of the provision (*Canadian Broadcasting Corp., supra*, at 512). To this may be added the very recent decision in *Libman*. There, in assessing the justifiability of spending restrictions in Quebec's referendum law under s. 1 of the *Charter*, the Court referred to *Dagenais* as 'clarifying' the third step of the proportionality analysis, without suggesting it was limited to certain cases (*Libman, supra*, at para 38), and would have applied it to its review of the referendum law but for the fact that the law was found not to be minimally impairing under the second proportionality test (*Libman, supra*, at para. 83).

Given that there is some uncertainty about when a balancing of deleterious and salutary effects is required, I believe it is most appropriate for me to both assess the deleterious effects of s. 7(1)(b) on freedom of expression against its objective and against its salutary effects. Before conducting this analysis, it is necessary to determine the standard of proof to be applied. The Respondents and supporting intervenors argued that in determining the salutary effects of a measure, what is required is empirical proof of the actual extent of the harm that the measure forestalls. Those on the other side said that such a standard is far too onerous.

In general, as I have discussed earlier, the proportionality analysis does not require a scientific standard of proof, and the level of scrutiny will vary depending on factors such as the nature of the infringing measure (a total or partial ban; a criminal or a human rights statute) and the nature of the expression restricted. Having regard to the way that the various steps of the proportionality analysis have been applied in the freedom of expression cases in which a lowered level of scrutiny has been found appropriate, I believe the following proposition is an accurate summary of what is required: While evidence of the impact of the measure or of various possible alternatives to it will always be relevant and may be conclusive, the absence of such evidence will not necessarily prove fatal to the justifiability of the measure under s. 1, unless the measure cannot be justified on the basis of common sense or the application of reason and logic. In the absence of authority which demonstrates that a higher standard of proof is required for the third proportionality test, it seems to me that this is what is required in the balancing of effects in respect of s.7(1)(b) of the *Code*. Support for this conclusion is found in *Canadian Broadcasting Corp.*, *supra*, at 36, (the only case to which I was referred in which the *Dagenais* balancing is undertaken in respect of a legislative provision). There, having decided that it was necessary to assess the deleterious and salutary effects of the measure, La Forest J. simply said:

Parliament has attempted to balance the different interests affected by s. 486(1) by ensuring a degree of flexibility in the form of judicial discretion, and by making openness the general rule and permitting exclusion of the public only when public accessibility would not serve the proper administration of justice. The discretion necessarily requires that the trial judge weigh the importance of the interests the order seeks to protect against the importance of openness and specifically the particular expression that is limited. In this way, proportionality is guaranteed by the nature of the judicial discretion.

This is a somewhat unusual case in that, having interpreted the provision to require that the discretion only be exercised when the salutary effects of granting any particular request for exclusion of the public outweigh the deleterious effects on freedom of expression of such an order, one must assume that the provision will be properly applied so that every order made under s. 486(1) will be one in which salutary effects actually outweigh deleterious ones. However, regardless of the interpretation of the statute, it was still open to the Court to enquire whether the deleterious effect on expression of allowing judges the discretion to grant exclusion orders at all is or is not outweighed by the salutary effects of such a statutory discretion. As well, the Court could have required evidence of what these effects were. That it did not, and that it was not even necessary to review the effects of the statutory grant of discretion itself, suggests to me that the effects analysis adopted in *Dagenais* is considerably less rigorous than the Respondents and their intervenors assert. It may even be quite cursory in some cases and, in any event, evidence proving the salutary effect of the measure is not required.

In the present case, as I have already said, it is not possible to measure the effects of the provision in an empirical sense. In *Eldridge*, the cost of providing the requested service was known and, as noted by the Court, the cost of providing related services could have been estimated so as to establish the salutary effect of cost savings advanced by the government. Here, however, the degree to which s. 7(1)(b) (rather than other societal factors) minimizes the manifestation of hatred and thereby promotes the equality of vulnerable groups obviously cannot be scientifically determined. It is equally difficult to determine the actual effect on expression. Although there was some evidence of the impact of the provision in the circumstances of the present case, which I will summarize below, the focus of the effects analyses must be on a balancing of the reasonably anticipated effects of the measure.

Turning to the effects of s. 7(1)(b) of the *Code*, the parties and intervenors generally appear to agree upon the likely effects of the section. Those challenging the legislation, however, argue that these effects are deleterious to freedom of expression while those supporting the legislation argue that the effects are salutary in the sense of promoting an important public good. More specifically,

those challenging the restriction in s. 7(1)(b) say it has a deleterious effect on the self-development, through expression, of the speaker and it curtails his or her freedom to persuade others of his or her hateful or contemptuous views of a person or group based on their race, religion, or other listed grounds. Those supporting the legislation say that this effect is salutary in that it protects the targets of such expression from the loss of self-esteem, increased marginalization and other harms that are likely consequences of an increased legitimization and acceptance of such views by others. Moreover, the effect of restricting the expression of hatred or contempt may well be to enhance the exercise of freedom of expression by those who would have been silenced by being the objects of publicly expressed hatred: *Ross, supra*, at 877-8.

The BCCLA also argued that an important deleterious effect on expression is that s. 7(1)(b) represents a "retreat from democracy." This deleterious effect is said to include the "loss of opportunity for civic activism" because the existence of s. 7(1)(b) encourages citizens to rely more on the state and less upon themselves to achieve equality; further, the provision is said to remove the "opportunity to undertake public education on issues of intolerance" and to remove "the opportunity to identify those who promote hate". However, in *Keegstra* and in *Taylor*, the majority of the Court characterized similar restrictions as democracy-enhancing. In my view it is more likely that democratic opportunities are enhanced rather than reduced by the measure. For example, the considerable publicity generated by the hearing of this complaint prompted a lively and thoughtful debate on the values at stake, and both sympathetic and critical evaluations of the impugned publication and the legislation itself as evidenced in numerous letters to the editors of newspapers and citizen participation in other media.

Although it may be difficult to characterize some effects of the measure as deleterious or salutary, there is no question that its "chilling effect" (that it will silence some expression that would not actually be prohibited by the section) is deleterious to freedom of expression. As noted in *Taylor, supra*, at 932, the chilling effect of a human rights prohibition is significantly less than that of a criminal provision. However, the potential that a complaint may be found justified (or that it may be laid at all) under a human rights code clearly has some stigmatizing effect on a potential

respondent. Deterrence of expression that would contravene s. 7(1)(b) is an important element of the *Code*.

There was some evidence of the chilling effect of s. 7(1)(b) in the present case. In cross-examination, Mr. Renshaw, editor of the Respondent North Shore News, testified that the enactment of the provision had not led to a dramatic change in coverage of stories. He indicated that there was some increased concern but also conceded that "we continue to publish the paper and cover stories as we have" (T. May 27, p. 59-60). He also testified (in chief) that he had probably refused to publish three of Mr. Collins' columns because he was uncertain of the scope of s. 7(1)(b) (T. May 27, p. 24). To put this in some perspective, the Complainant calculated, on the basis that Mr. Collins' columns are published twice a week and the legislation was enacted in October, 1994, that there were some 260 columns in this period.

The Respondents argued at length that a significant chilling effect of the measure was the cost of getting legal opinions on whether particular proposed publications would contravene the section. However, Mr. Renshaw admitted in cross-examination that he had not sought a legal opinion on whether any of Mr. Collins' columns would contravene the section before the commencement of the present complaint (T., May 27, p. 84) and only two legal opinions had been sought since. Both of these concerned a single column. Mr. Renshaw testified that he considered legal opinions to be too expensive. In these circumstances, the cost of these two legal opinions falls considerably short of what would be required to establish the general proposition that s. 7(1)(b) had a chilling effect on the Respondent newspaper by effectively requiring it to solicit legal opinions on proposed publications.

Further, I consider the cost of legal advice as, at best, a marginal component of the chilling effect. The real question is to what extent people are likely to be deterred from making statements which would not in fact be found to contravene s. 7(1)(b) because the scope of the section is misunderstood, or the statements themselves fall within that realm of uncertainty that necessarily accompanies the creation of any legal standard.

In considering this question, it must be remembered that the chilling effect of a measure is very much a function of the public perception of its scope. In this regard, the media has an important role to play in shaping that perception through its descriptions of the scope of a measure. As the Complainant submitted, the Respondents and Press Council publicly and repeatedly described the scope of s. 7(1)(b) in the broadest possible terms, to the point of blurring the line between their opinion on the scope of the legislation and a factual description of the measure itself. For example, on May 21, 1997, after commencement of this hearing, the Respondent newspaper published a description of the content and scope of s. 7(1)(b) giving examples of statements "that would likely expose persons to hatred and would therefore be a suitable target for human rights prosecution today in British Columbia." The brief passages which follow include criticisms of farmers, politicians, men over forty ("Every man over 40 is a scoundrel") and the Conservative party ("The Conservative party is not a party but a conspiracy") (Ex. 51). The remedies for contravening s. 7(1)(b) are described in this article and in numerous other articles and columns published by the Respondent newspaper as "hefty" and "unlimited" "fines" or "penalties". Frequently, the fact that the *Code* provision is limited to the expression of hatred or contempt on certain stated grounds was omitted from reports (Ex. 49-50; Ex. 53, Tabs 5, 7, 8, 9, 11). It is to be hoped that the considerably narrower interpretation I have given to s. 7(1)(b), as it may be modified on judicial review, will receive similar publicity. If so, the chilling effect of the measure may be considerably reduced.

While the evidence I have reviewed gives some sense of the impact of the provision particularly in the circumstances of the present complaint, and provides some context for the deleterious effects on the right infringed, I do not accord it much weight in an analysis which I have already indicated cannot be empirically based. I have reviewed it primarily because it was raised in argument. The central question, however, is whether the deleterious effects on expression, specifically, the chilling effect, and the silencing and stigmatization of respondents to s. 7(1)(b) complaints in the context of a human rights provision (and attendant procedures and remedies) are outweighed by the importance of the legislative objective, and by the salutary effects of the measure.

The legislative objective of s. 7(1)(b) is to prevent and reduce the harmful effects of the public manifestation of hatred and contempt against disadvantaged groups. In light of the conclusions of the Supreme Court of Canada on the importance of this kind of legislative objective in *Keegstra*, *Taylor* and *Ross*, and the findings, particularly in *Keegstra* and *Taylor*, that the deleterious effects of similar restrictions on speech were outweighed by the importance of the legislative objective, I can arrive at no other conclusion in the present case. In *Keegstra*, *supra*, at 787, Dickson C.J. said:

It is also apposite to stress yet again the enormous importance of the objective fueling s. 319(2), an objective of such magnitude as to support even the severe response of criminal prohibition. Few concerns can be as central to the concept of a free and democratic society as the dissipation of racism, and the especially strong value which Canadian society attaches to this goal must never be forgotten in assessing the effects of an impugned legislative measure.

See also *Taylor*, *supra*, at 939-40.

The salutary effects of s. 7(1)(b) are described in their most basic terms by the BCCLA:

... (i) some people who would otherwise utter oppressive expressions will be deterred to not actually utter them because of the law and (ii) where someone does utter such expressions, some complainants will be able to bring successful complaints under the *Code* such that they receive a remedy that addresses, at least in part, the harm flowing from the expressions.

The Complainant submitted that a salutary effect of the provision was identified by Mr. Collins himself, when he addressed in cross-examination the impact of the measure on his writing (May 28, pp. 28-9):

One can always write around something. But it's more trouble to write around something than it is to write directly. And I'm a believer in writing directly and getting the thing off one's chest without messing around. So you have to think twice or three times before you can say the things in the way you want to say them.

Again, without placing more than minimal weight on this evidence in relation to salutary effects, it is worth noting that Mr. Collins, who apparently considered the legislation to have a significantly broader reach than I have interpreted it to have, nevertheless felt that all it really imposed was a requirement to think carefully about what he wrote, not that it stopped him from writing what he wanted. As I have already said, I believe that encouraging responsible journalism is important, and it would appear that this is a salutary effect of the measure in question.

Turning to the balancing of effects, it can be reasonably anticipated that the measure will suppress two categories of expression. First, it will suppress expression that is hateful or contemptuous of a person or group because of a listed ground and which is likely to expose such person or group to further risk of hatred or contempt. That is, it will suppress expression that falls within the scope of the provision, either because a complaint is found justified and an order is made under s. 37(2)(a), or because the existence of s. 7(1)(b) will deter such speech. In respect of this kind of expression, as the jurisprudence establishes, it is only tenuously connected to the values underlying freedom of expression, and the salutary effect of actually reducing the prevalence of such expression will be great. Suppressing hateful expression which is likely to expose target group members to further risk of hatred or contempt removes or minimizes a significant barrier to creating a social climate free of discrimination and intolerance. I have no difficulty concluding that the salutary effects outweigh the deleterious effects in respect of the expression that is caught by s. 7(1)(b).

It is more difficult to balance salutary and deleterious effects in respect of the second kind of expression that is suppressed by the measure. This is expression which would *not* contravene the provision, but which is not expressed because of the law's chilling effect. In balancing salutary and deleterious effects in this context, it is important to be clear about the nature of this expression. It is reasonable to assume that the expression that would be chilled by s. 7(1)(b) would be expression that is "close to the line". In other words, I believe I should assume that potential speakers have a reasonable understanding of the scope of s. 7(1)(b). Expression of this kind would include speech that is hateful or contemptuous but which is not likely to expose targets to further

risk of hatred or contempt; speech which is not in itself hateful or contemptuous but which is likely to stimulate others to manifest hatred or contempt; and speech which is intended to be hateful or contemptuous but does not have the effects stipulated by s. 7(1)(b). The chilling effect of s. 7(1)(b) is to cast a shadow around the expression that actually does contravene the provision. Within this shaded region, some expression will be deterred. But the way in which the law deters such expression is noteworthy. Given the narrow scope of the provision, its chilling effect on the speech it does not actually prohibit will not be so much to suppress certain messages entirely, but to require authors of communications that might be close to the line think very carefully about *how* they say what they wish to say. The existence of s. 7(1)(b) requires them to advert to the likely impact of the message on others. (This is significantly different than s. 319(2) of the *Criminal Code*, which is concerned primarily with the speaker's intention rather than the impact on the victim.) Some expression that would not have been found to contravene the provision will be suppressed because of the speaker's uncertainty about its impact. On balance, even with respect to expression that is not objectively hateful or contemptuous and likely to expose persons or groups to further hatred or contempt on the listed grounds, but which is "close" to such expression, I find that the salutary effects outweigh the deleterious effect on freedom of expression. To paraphrase McLachlin J. in *Taylor*, I find that s. 7(1)(b) of the *Code* is reasonably effected, proportionate to the evil and sensitive to the fundamental right of free expression (at 970).

7. Conclusion on Section 1

Accepting that s. 7(1)(b) of the *Code* infringes the guarantee of freedom of expression in s. 2(b) of the *Charter*, I find that the objective of the measure is pressing and substantial, and that the measure itself is proportional to the objective, as measured by each of the three proportionality tests. It is rationally connected to the legislative objective in that it is not arbitrary, or irrational, nor does it overreach the justifiable limits of the objective. Further, it is minimally impairing of freedom of expression in that there appears to be no alternative measure that is both significantly

less intrusive of freedom of expression and equally effective to attain the legislative objective of s. 7(1)(b). Finally, considering the likely impact of the provision, I find that its deleterious impact on freedom of expression is outweighed both by its objective and by its salutary effects. In sum, s. 7(1)(b) of the *Code* is a reasonable limit on freedom of expression that is demonstrably justified in a free and democratic society. It is constitutionally valid.

This conclusion on the constitutional validity of s. 7(1)(b) under the *Charter* relies in large measure on the reduced level of scrutiny which I have found appropriate based on the context, the nature and extent of the infringement on expression, and the fact that the infringing measure is a human rights provision. Perhaps even more importantly, my conclusion on this constitutional issue rests on the narrow reading I gave the provision when interpreting it in light of the *Charter*. Mindful of the totality of the Supreme Court of Canada's jurisprudence on freedom of expression, it is my view that a broader interpretation of the reach of s. 7(1)(b) would not be constitutionally supportable.

VI. Merits

Having determined that s. 7(1)(b) is constitutionally valid under the *Constitution Act, 1867* and the *Charter*, I am now in a position to consider the merits of the complaint. It is convenient to set out again the two part test I have interpreted the provision to require:

First, does the communication itself express hatred or contempt of a person or group on the basis of one or more of the listed grounds? Would a reasonable person understand this message as expressing hatred or contempt in the context of the expression?

Second, assessed in its context, is the likely effect of the communication to make it more acceptable for others to manifest hatred or contempt against the person or group concerned? Would a reasonable person consider it likely to increase the risk of exposure of target group members to hatred or contempt?

Before applying each of these tests, three general comments on how the merits of a s. 7(1)(b) complaint should be determined are in order. First, as I have said, each test is a question of mixed fact and law. Thus, while evidence is both relevant and helpful in applying the tests, it is not in itself determinative of the outcome of the complaint. In the present case, there could not have been a greater difference between the Complainant and Respondents with respect to the evidence adduced and the arguments advanced on the merits of the complaint. While the Complainant called considerable evidence, including three experts, and presented thorough arguments on the issue, the Respondents called virtually no evidence on the merits. Their argument on the issue amounted to little more than counsel's bare assertion that the article was not hateful. Thus, if evidence were determinative of the issues, I would have agreed with the Complainant's submission that "the evidence that the article contravenes the section is overwhelming and virtually unchallenged" and would have found the complaint justified.

Second, what is required under each test is an objective assessment, based on a "reasonable person" standard. However, this standard is not abstract; it imports a consideration of context. The context is that of the audience of reasonably anticipated recipients of the impugned expression, and the reasonable person is assumed to share the characteristics of that group. Evidence may be very helpful in establishing this context. In the present case, the reasonable person can be presumed to be a resident of the North Shore, which I have already found to be a culturally, socially and economically diverse urban community of about 160,000, with an expanding Jewish population (T. May 14, p. 25; May 27, p. 55; Ex. 10, p. 5). Further, the evidence established that Mr. Collins' columns are published regularly in the North Shore News and have been for some time; and that Mr. Collins' views are well-known and controversial in the community (T. May 27, pp. 6-7, 13, 35-6). Therefore, a reasonable reader of the impugned publication would recognize the author's name and would be generally cognizant of some of his previously published opinions.

Third, it is important to recognize the difference between the two assessments s. 7(1)(b) requires. The first test is necessarily directed at the meaning a reasonable reader would derive from the

publication itself. One's familiarity with the author of a statement influences one's understanding of the statement to some extent, as does the credibility of the forum in which it is expressed, but the primary focus of this enquiry is on the message itself and how a reasonable reader would understand it. The second test addresses the likely impact of the message on the group of recipients and the consequences for members of the target group. The context of the publication carries significantly more weight in this assessment. Factors such as the credibility likely to be accorded to the expression because of the identity of the author, and how it is presented and disseminated will be influential in determining the likelihood that the message will legitimize further manifestations of hatred or contempt. With respect to the target group, factors such as the group's history of vulnerability to hatred and contempt and the degree to which the expression reinforces existing negative stereotypes of the group on the basis of the listed ground(s) will be important to both assessments. Evidence relating to all of these various factors will be helpful.

Turning to the first requirement under s. 7(1)(b), I must determine whether the impugned publication expresses hatred or contempt against Jews on the basis of their race, religion and/or ancestry. This inquiry must start with an examination of the expression itself, which is reproduced in its entirety in Appendix 1.5. Reading the article itself, even without the benefit of evidence on its meaning, I have no hesitation in finding that it is anti-Semitic. It says, either directly or by clear implication that films like *Schindler's List* are hate propaganda by Jews against Germans; that the generally accepted figure of six million Jewish victims of the Holocaust is grossly inflated and the Holocaust is no different than other wartime mass killings; that the popularity of the film and its likely success in the Academy Awards is a product of Jewish control of Hollywood. I find that a reasonable person would understand this to be the meaning of the column. I further find that a reasonable person would consider the column to be anti-Semitic, offensive and hurtful to Jewish people.

However, s. 7(1)(b) of the *Code* does not restrict all anti-Semitic expression. It does not even prohibit all offensive and injurious anti-Semitic expression. In light of the *Charter* jurisprudence, the terms "hatred" and "contempt" must be taken to signify extreme emotions of ill-will towards

their targets. As Dickson C.J. said in *Taylor, supra*, at 928, the phrase "refers to unusually strong and deep-felt emotions of detestation, calumny and vilification". As I have stated, the factors to be considered in determining whether the article is hateful or contemptuous in this sense include its content, its tone and the vulnerability of the target group.

With respect to content, I have summarized the main points of the column and found them to be obviously anti-Semitic. The expert opinion of Bart Testa (Ex. 7) elucidates the various anti-Semitic elements of the column and is helpful in confirming the extent to which the article reinforces existing negative stereotypes of Jewish people. It presents Jews in a negative light, as powerful propagandists and profiteers, and it depicts, in grossly inaccurate terms, the extent of their victimization in the Holocaust. Taken on its own, this meaning is offensive and harmful. In my view, however, the content of the column is not so extreme that, taken on its own, it is hateful or contemptuous in the sense contemplated by s. 7(1)(b). This is a case where regard must be had to tone and to the vulnerability of the group in order to determine whether, taken together with the content, the overall meaning is hateful or contemptuous.

Turning to the tone of the column, I do not find in it the quality of emotion signified by the phrase "hatred or contempt." I find the tone of the article to be nasty: it is deliberately provocative and insulting. It is mean-spirited and expresses a smug self-satisfaction in the author's apparent success in freeing himself from the grip of the "propaganda" by which the rest of society are still duped. The style of presentation is informal. In my view, considering the column as a whole, the way the content is presented (its tone) does not capture the degree of calumny, detestation or vilification signified by "hatred or contempt" as the phrase is used in s. 7(1)(b) of the *Code*.

My conclusion that the content and tone of the column, taken together, do not fall within the scope of the prohibition in s. 7(1)(b) is not altered by my finding that Jewish people are extremely vulnerable to persecution and discrimination, and are frequently the targets of hatred and contempt. I have already alluded to the persistence and severity of anti-Semitism both locally and globally. However, accepting the extreme vulnerability of the group concerned, this factor alone

is insufficient, in my view, to render the column hateful or contemptuous in the sense required by s. 7(1)(b). I believe that to find otherwise would be to broaden the scope of the prohibition beyond "hatred or contempt" in order to encompass *all* harmful anti-Semitic expression. In my view, the words "hatred or contempt" do not reach that far.

Therefore, I find that the complaint is not justified.

While my conclusion on the first prong of the s. 7(1)(b) analysis is sufficient to dispose of the complaint on the merits, I believe it is appropriate in the circumstances of this case to indicate how I would have applied the second test under the provision. Since this is the first time that s. 7(1)(b) has been interpreted by a tribunal, the public understanding of the scope of the section (and the opportunity to minimize its chilling effect) may be enhanced by an illustration of what the whole of the section requires. Further, as will be seen, my finding that the complaint is not justified rests entirely on my determination that the *Charter* requires the first test under s. 7(1)(b), that is, that the expression itself be hateful or contemptuous. If I am wrong in this conclusion, and it is only necessary to find that the expression in issue increases the target group's risk of exposure to hatred or contempt by making such manifestations more acceptable, then I would find the complaint to be justified.

As I have said, the second test requires an objective and contextualized assessment of the likely impact of the impugned publication in terms of whether it will legitimize the expression or other manifestation of hatred or contempt by others against the particular person or group. I have outlined above the various factors that I consider helpful in making this determination. It remains to consider the evidence as it relates to those factors in the present case.

With respect to the factors relating to the credibility and persuasiveness of the publication, the evidence established that Mr. Collins is a well-known and long-standing columnist with the North Shore News. His columns have generally been published twice a week for a number of years, are known to be provocative or controversial, and are widely read. Although they generate counter

speech, in the form of letters to the editor, such letters are not always published and, although Mr. Renshaw declined to say so directly, the clear implication of his cross-examination on this point was that if Mr. Collins wished, he could always get the last word in any exchange (T. May 27, p. 93-6, 100-2). Although Mr. Collins writes on various topics, he has repeatedly expressed anti-Semitic views in his columns. (Ex. 54, Affidavit of Lynda Viippola, and appendices of articles and letters to the editor of the Respondent newspaper referring to Mr. Collins over an 8 year period.) This fact forms part of the context of the assessment of the impact of the impugned publication on others, it does not carry the same weight as it would in a case where several publications are the subject of a s. 7(1)(b) complaint. I accept the expert opinion of Professor Anderson that Mr. Collins is likely an influential columnist because of his long association with the North Shore News, which itself enjoys a special status derived from its position as the North Shore's community newspaper (Ex. 8). The diversity of the community, to which I have already referred, means that the community of readers of the column includes some persons who hold pre-existing anti-Semitic prejudices and would be encouraged to express them if they sensed a level of community tolerance of anti-Semitism. There is some evidence that some of Mr. Collins' columns have had such an effect. The appendices to the Affidavit of Linda Viippola (Ex. 54) include some letters to the editor of the North Shore News that express support for Mr. Collins and advocate anti-Semitism.

The expert opinions of Professors Testa (Ex. 7) and Hill (Ex. 9) are also relevant to this assessment. Without entering the debate over whether semiotic analysis is one way to interpret a text or is a neutral revelation of its meaning, which was raised in cross-examination, I accept that, in general, the various rhetorical techniques identified by Professor Testa are designed to and have the effect of enhancing the column's persuasiveness. Its primary effect is to reinforce existing anti-Semitic stereotypes. Professor Hill summarized the impact of the column in the following way (Ex. 9, p. 7):

Mr. Collins' column contributes to the hatred of the Jews because his writings echo the themes and anti-Semitic canards found in the history of anti-Semitism. He promotes mistrust and contempt by suggesting that Jews are deceitful and conspire

to swindle the non-Jewish world for their own gains. Mr. Collins poses as a dauntless civil libertarian and a champion of free speech. This pose has made it possible for him to continue publishing his anti-Semitic diatribes in newspapers such as *The North Shore News*. Access to publication makes him credible to some of those who are already inclined to be anti-Semitic and to those who tend to believe anything that appears in print.

Consideration of the extreme vulnerability of Jewish people to hatred and contempt, which I have already described, supports this conclusion. Further, the anti-Semitic content of the column, its informal, yet provocative tone, the method and context of its presentation, all invite the expression of further anti-Semitic prejudices. Its effect is to suggest that the expression of anti-Semitism is acceptable, even desirable. Although, as I have said, not all anti-Semitic expression will constitute hatred or contempt, it is reasonable to assume that some of it will. Thus, a reasonable person would conclude that the likely effect of the column in issue will be to increase the risk to Jewish people of being exposed to hatred or contempt because of their race, religion and/or ancestry.

VII. Conclusion

In summary, s. 7(1)(b) of the *Code* is validly enacted provincial legislation. It does not intrude on federal jurisdiction over criminal law, nor does it exceed provincial jurisdiction by regulating political speech. The provision does infringe the guarantee of freedom of expression in s. 2(b) of the *Charter*, but is saved under s. 1 of the *Charter* as being demonstrably justified as a reasonable limit in a free and democratic society. Thus, the constitutional challenge to the legislation fails.

I have interpreted s. 7(1)(b), in light of the *Charter*, to require a two part analysis: First, does the communication itself express hatred or contempt of a person or group on the basis of one or more of the listed grounds? Would a reasonable person understand this message as expressing hatred or contempt in the context of the expression? Second, assessed in its context, is the likely effect of the communication to make it more acceptable for others to manifest hatred or contempt against

the person or group concerned? Would a reasonable person consider it likely to increase the risk of exposure of target group members to hatred or contempt?

In the present case, although the publication in issue is likely to make it more acceptable for others to express hatred or contempt against Jewish people because of their race, religion or ancestry, I find that it does not itself express hatred or contempt. Therefore, the complaint is not justified and, pursuant to s. 37(1) of the *Code*, the complaints against the Respondent Doug Collins and the Respondent North Shore News are each dismissed.

Dated at Vancouver this 4th day of November, 1997.


Nitya Iyer
Tribunal Member



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March 4, 1997

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Dear Sirs/Mesdames:

Re: Canadian Jewish Congress and Harry Abrams
-and-
North Shore Free Press dba North Shore News
-and-
Doug Collins
-and-
Harry Abrams
-and-
Robert Howse dba The Daily Victorian
-and-
The Human Rights Act

The British Columbia Press Council (the "Press Council") has applied for intervener status at the hearing of these complaints. Whether these cases will be heard together is the subject of a separate application. At this point, a hearing date has been set only for the complaints filed by the Canadian Jewish Congress. This decision relates only to ~~these~~ complaints.

The Press Council requests that it be given intervener status permitting it to do the following:

- (a) lead evidence relating to the constitutional validity of section 2 of the *Human Rights Code* (the "Code");
- (b) cross-examine witnesses called by the complainants or by the Attorney General of British Columbia concerning the constitutional validity of section 2 of the *Code*; and
- (c) make submissions concerning the constitutional validity of section 2 of the *Code*.

There does not appear to be any dispute that the Tribunal has the authority to add interveners. Moreover, section 32 of the *Code* gives the tribunal member designated to hear a complaint broad powers to allow interveners and to specify terms for such interventions. The *Code* is silent with respect to the factors to consider when determining intervention applications.

In *MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 380 (B.C.C.A.) at 383, Esson J.A. stated:

I do not mean to say that every application by a private or public interest group which can bring a different perspective to an issue should be allowed. I say only that, in some cases, that is a factor which will overcome the absence of a direct interest in the outcome. In each case, it will be necessary to consider the nature of the issue and the degree of likelihood that interveners will be able to make a useful contribution to the resolution of the issue without injustice to the immediate parties.

Seaton J.A. stated as follows in *Canada (A.G.) v. Aluminum Co. of Canada* (1987), 10 B.C.L.R. (2d) 371 (C.A.) at 385:

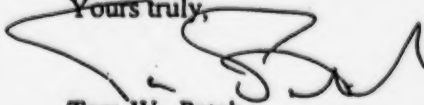
Interveners should not be permitted to take the litigation away from those directly affected by it. Parties to the litigation should be allowed to define the issues and seek resolution of matters they determine appropriate to place in issue. They should not be compelled to deal with issues raised by others.

With these judicial comments in mind, I have decided that the Press Council should be allowed limited intervener status. The complaints relate to certain articles allegedly written by Mr. Collins and published in the North Shore News. Counsel for the respondents has indicated that he intends to argue that section 2 of the *Code*, under which these complaints were filed contravenes section 2 of the *Charter* which protects, among other things, "freedom of thought, belief, opinion and expression, including freedom of the press..." According to an affidavit submitted by Gerald Albert Porter, executive secretary of the Press Council, the Press Council was established in 1983 and now represents all 16 daily newspapers in this province and more than 100 community newspapers. Part of its mandate is "to preserve the established freedom of the press".

It is likely that the Press Council's perspective will have much in common with those of Mr. Collins and the North Shore News; however, I think the nature, experience and purpose of the Press Council

are such that it is probable that it can make a useful contribution with respect to the constitutional validity of section 2 of the *Code*. It should not be permitted to use its participation to raise issues that the parties do not wish to be placed in issue. Nor should it be in a position to delay or prolong the hearing unnecessarily. I have, therefore, concluded that the Press Council will be allowed to make legal submissions on the constitutional validity of section 2 of the *Code* and to lead affidavit evidence to provide a factual context for those arguments. The deponents of the affidavits must be available for cross-examination or for questions from the Tribunal. Otherwise, the Press Council will not be permitted to lead evidence or cross-examine witnesses except with leave of the Tribunal. This decision is based on the assumption that the Press Council is able to proceed on the dates now set for this hearing.

Yours truly,

A handwritten signature in black ink, appearing to be 'Tom W. Patch', written over the closing 'Yours truly,'.

Tom W. Patch
Tribunal Member



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Brahm Martz, Martz Shipman
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Dear Sirs/Mesdames:

Re: Canadian Jewish Congress v. the North Shore News and Doug Collins

There are three outstanding applications for intervener status; the B.C. Civil Liberties Association (the "BCCLA"), the B.C. Human Rights Coalition (the "Coalition") and the Chinese Benevolent Association of Vancouver (the "CBAV"). In considering these applications, I have applied the same factors and law referred to in my letter of March 4, 1997 concerning the Press Council's application for intervener status.

The BCCLA seeks standing to "make oral and written arguments based on principled and legal arguments regarding the constitutionality of section 2 of the *Human Rights Code* ... [and] to receive and reply to all other parties' arguments regarding section 2". It does not seek standing to present evidence or cross-examine witnesses. According to the affidavit of John Westwood, the Executive Director of the BCCLA, the BCCLA is a charitable society whose objects include the promotion, defence, sustainment and extension of civil liberties and human rights. It has a long history of dealing with civil liberties including freedom of expression and discrimination.

The Coalition and the CBAV both seek standing to present and respond to argument concerning the constitutionality of section 2 of the *Code* and to enter, through affidavits, evidence to provide a factual context for their constitutional arguments.

In her affidavit Susan O'Donnell, the Coalition's Executive Director, states that the Coalition is a charitable organization established in 1982. Broadly stated, the objects of the Coalition include the promotion and strengthening of human rights throughout British Columbia and Canada. It has been involved in the issue of discrimination in publications since 1982.

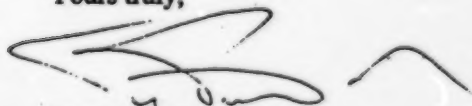
William Fung Wing Yee, the President of the CBAV, states that the CBAV was incorporated in 1906 under the *Society Act*. One of its purposes is: "To maintain and strive for the rights and privileges of Chinese Canadians and landed immigrants and to fight against racial discrimination." He states that it has consistently involved itself in efforts to protect its members from discrimination and racism.

I am satisfied that all three of these applicants will bring a perspective to the hearing that will likely be helpful to the Tribunal in resolving the issues in dispute. I do not think their intervention will unduly delay or prolong the hearing. Accordingly I have decided to grant the BCCLA, the Coalition and the CBAV limited intervener status. The BCCLA is granted the status it requested; that is, it will have standing to make argument with respect to the constitutionality of section 2 of the *Code* and to reply to other parties' arguments on that issue. It will not have standing to lead evidence or cross-examine witnesses. The Coalition and the CBAV will have the standing they requested which is the same as the limited standing previously granted to the Press Council; that is, they will be allowed to make legal submissions on the constitutionality of section 2 of the *Code* and to lead affidavit evidence to provide a factual context for those arguments. The deponents of the affidavits must be available for cross-examination or for questions for the Tribunal. Otherwise, they will not be permitted to lead evidence or cross-examine witnesses except with leave of the Tribunal. All interveners must be willing to proceed on the dates already scheduled.

Counsel for the Canadian Jewish Congress requested that the intervener status of the BCCLA be subject to a term that the CJC be permitted to review documents in the possession or control of the BCCLA that may relate to the affidavit of John Westwood and that Mr. Westwood be made available for cross-examination. In my view, there is no basis for such a term. The affidavit was for the purpose of the intervention application. It will form no part of the evidence at the hearing. Moreover the BCCLA will not be leading any evidence at the hearing. If the CJC believes that the BCCLA has information that is relevant to its case, it may compel Mr. Westwood testify through summons.

Counsel for the North Shore News and Doug Collins requested that, if granted intervener status, the Coalition be required to comply with a number of terms involving production of documents and affidavit material, and answering of interrogatories. I am not prepared to impose such terms at this time. Matters related to pre-hearing disclosure will be addressed at the case management conference scheduled for April 18, 1997. All counsel, including those representing the interveners, should be prepared to discuss at that conference the nature of the evidence they intend to present at the hearing.

Yours truly,



Tom W. Patch
Tribunal Member



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March 13, 1997

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Dear Sirs/Mesdames:

Re: Canadian Jewish Congress
-and-
North Shore Free Press dba North Shore News
-and-
Doug Collins
-and-
Harry Abrams
-and-
Robert Howse dba The Daily Victorian
-and-
The Human Rights Act

Counsel for Harry Abrams has applied to have his complaints against Doug Collins, The North Shore News and Robert H. Howse doing business as "The Daily Victorian", both on his own behalf and on behalf of others, heard in conjunction with the complaint of the Canadian Jewish Congress (the "CJC") against Doug Collins and the North Shore News. Section 31 (4) of the *Human Rights Code* (the "Code") states that: "The

member or panel may hear 2 or more complaints together if the member or panel determines that it is fair and reasonable in the circumstances to do so."

The CJC complaint alleges that Mr. Collins and The North Shore News discriminated against Jewish persons by publishing a specific article on March 9, 1994. Mr. Abrams has filed two complaints. One is against Doug Collins, the North Shore News and Robert H. Howse. That complaint alleges that "the continual barrage of articles written by Mr. Doug Collins ... have a cumulative affect [sic] of promoting hatred and contempt towards Jewish people." Four articles are specifically mentioned, one of which is the article referred to in the CJC complaint. Mr. Abrams' second complaint is made on behalf of Sikh, Iranian, Japanese and Chinese persons against Mr. Collins and the North Shore News. He alleges that articles written on an ongoing basis have a cumulative effect of discriminating against Iranian, Japanese, Chinese and Sikh persons and are likely to expose them to hatred and contempt. Two articles are specifically mentioned.

Mr. Collins and the North Shore News are common elements in all these complaints. Counsel for these two respondents has indicated that he intends to argue that section 2 of the *Code* violates section 2 of the *Charter*. As a result of the constitutional challenge, the Attorney General is also a party in all the complaints.

Counsel for Mr. Abrams submits that hearing the complaints together "is the most efficient use of the resources of all and the most convenient and practical method of placing all of the evidence before the Tribunal." His application is opposed by counsel for Mr. Collins and the North Shore News and counsel for the CJC. Mr. Howse has taken no position. Counsel for the Attorney General has made no submissions on this point but is reported by Mr. Bulmer as sharing Mr. Abrams' concern with respect to the probable duplicity of constitutional argument.

I have concluded that it would not be fair and reasonable in the circumstances to join the hearing of Mr. Abrams' complaints to that of the CJC. It is true that the constitutional arguments will likely be similar in all three complaints. Further, the evidence led on behalf of Mr. Collins, the North Shore News and the Attorney General with respect to the constitutional question may be similar in both cases. On balance, however, it does not seem fair and reasonable to risk delaying or prolonging the hearing into the CJC complaint because of the constitutional issue. The allegations in Mr. Abrams' complaints differ significantly from the CJC's allegations. His complaint on behalf of others raises completely different grounds than that of the CJC complaint, and will likely require a completely different evidentiary basis. The witnesses required to prove that Sikh, Japanese, Chinese and Iranian persons have been discriminated against are unlikely to be the same as those needed to prove discrimination against Jewish persons. Mr. Abrams' complaint on his own behalf has more in common with the CJC complaint; however, it too raises new issues. Not only does it refer to three articles not mentioned in the CJC complaint but it is based on the cumulative effect of articles written on an ongoing basis. I think that it is probable that the hearing would be prolonged because of these differences. My concern is exacerbated by Mr. Bulmer's statement that Mr. Abrams' case is "still developing".

In considering what is fair and reasonable I have considered the potential prejudice to all involved. It seems to me that, in terms of efficiency, Mr. Collins and the North Shore News have the most to gain if the

hearings are joined. They must be present throughout all of them and must deal with both the merits and the constitutional question. They oppose joinder. The Attorney General may have to appear as many as three times if the hearings are not joined, though only to address the constitutional issues. Counsel for the Attorney General made no submissions on this point. The CJC and Mr. Howse have most to lose by joined hearings. They will have to attend while evidence is given that may have only limited relevance to their complaints.

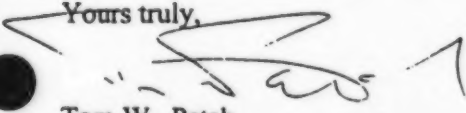
Mr. Abrams submits that he will be prejudiced if the hearings remain separate because his complaints will be impacted by any decision the Tribunal makes in his absence on essentially the same issues and evidence. A decision in this case, even if it is not binding on other Tribunal decisions, will be persuasive and may have an impact on Mr. Abrams' complaints. However, that impact may serve to shorten the Abrams hearing. Moreover, Mr. Abrams' complaints raise issues that will not be addressed in the CJC hearing. His complaints will not be rendered moot by a decision in the in the CJC complaint. It is true that a decision in the CJC hearing that section 2 of the *Code* contravenes the *Charter* could persuade the tribunal member hearing the Abrams' complaints to reach a similar conclusion. I do not think the fact that his complaints may be affected by application of a decision in the CJC case is sufficient reason for joining the hearings. If it were, then any cases which are based on section 2 of the *Code* would be entitled to joinder.

Finally, I have considered the potential prejudice to the Tribunal. Counsel for Mr. Abrams submits that, since constitutional questions should not be made in a vacuum, the facts in Mr. Abrams' complaint would assist the Tribunal in determining the constitutional questions. I agree with Mr. Sutherland's submission that the complaints are discrete and the facts in one should not be used to bolster the other. The factual basis for the CJC complaint will provide a sufficient context for the Tribunal to decide the constitutional question. There might be some efficiencies created for the Tribunal by hearing the complaints together as it would not have to deal with the same, or a similar, constitutional question two or three times. Nevertheless, I think the possibility of some savings for the Tribunal is outweighed by the prejudice some of the parties would face if the hearings were joined.

Mr. Bulmer's final submission was that, if the hearings are separate, the factual basis for all complaints should be heard before argument on the constitutional question. I do not agree with Mr. Sutherland that this argument has been fully addressed. The earlier question dealt with severance of the constitutional question, including related evidence, from the merits. Mr. Bulmer is merely seeking separation of evidence and some argument. Nevertheless, I do not think it is a good idea to split the case as suggested. Counsel have set aside the time they consider sufficient to hear and argue the case. Splitting it would likely add delay. Moreover, the complaints may not be heard by the same tribunal member. If they are not I can see no useful purpose being served by such a separation.

In summary, the application to join the hearing of Mr. Abrams' complaints to that of the CJC is denied. The request to sever constitutional argument from the rest of the case is also denied.

Yours truly,


Tom W. Patch
Tribunal Member

BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL IN
 THE MATTER OF THE HUMAN RIGHTS CODE
 S.B.C. 1984, C. 22 (as amended)
 AND IN THE MATTER OF A COMPLAINT

NO. 940767 AND 940768

May 15, 1997

BETWEEN:)	
CANADIAN JEWISH CONGRESS)	
COMPLAINANT)	ORAL RULING
)	OF THE
AND:)	TRIBUNAL MEMBER
NORTH SHORE FREE PRESS)	NITYA IYER
d.b.a. NORTH SHORE NEWS)	
And DOUG COLLINS)	
RESPONDENTS)	

* * * *

THE CHAIRPERSON: I am now going to give my ruling on the Attorney General's application to amend the complaint information form, which is Exhibit 1, and to amend the notice filed by the respondents under the Constitutional Question Act which is Exhibit 3, so as to confine both to section 2 (1)

(b) of the Human Rights Act.

The Deputy Chief Commissioner supports the application with respect to amending the complaint information form. The complainant has stated that it is proceeding only under section 2 (1) (b) in that if I were to find that the complaint was not justified under section 2 (1) (b), it would not seek an alternative finding under section 2 (1) (a). The complainant says amending the complaint information form is unnecessary but that I may amend it in the manner requested if I find it ambiguous.

The respondents accepts that this complaint concern a section 2 (1) (b) and not section 2 (1) (a). They say that I should not amend the complaint information form, first because it is unnecessary, and second, because, as I understand the argument, if the complaint is limited to section 2 (1) (b) of the Act, the remedies in section 17 (2) (d) of the Act may not be available.

This is said to be because section 17 (2) (d) authorizes the granting of specific remedies where, "The person discriminated against is a party to the proceedings". Mr. Sutherland

says that since the text of section 2 (1) (b) unlike section 2 (1) (a) and the heading to the section as a whole does not actually say "discriminate," section 17 (2) (d) may not apply. If so, this would adversely affect the argument he seeks to make, that the breadth of remedies available for a violation of section makes the legislation unsustainable under section 1 of the Charter.

I find that the face of the complaint information form is ambiguous as to whether the complaint is made in respect of section 2 (1) (b) alone or may also include section 2 (1) (a). The particulars of allegation do appear to narrow the scope of the complaint to section 2 (1) (b), but in the interests of complete clarity in the record, I find it preferable to amend the complaint information form.

Mr. Sutherland's argument about the remedies available to a complainant under section 2 (1) (b) is entirely answered, in my view, by reference to the definition of discrimination in section 1 of the Human Rights Act. And I note that the same definition appears in section 1 of the Human Rights Code. It says:

"'Discrimination' includes the conduct described in section 2, 3 (1) (a), 4 (a) or (b), 5 (1) (a), 6, 8 (1) (a) or (2), or 9 (a) or (b)."

Therefore, all of the remedies in section 17 (2) (d) of the Act are available in principle when a complaint is found justified under section 2 (1) (b) of the application. Therefore, the application to amend the complaint information form is granted for the record. It will now read:

"We, the Canadian Jewish Congress, allege that the above named respondents published or caused to be published an article that discriminates against Jewish persons and is likely to expose those persons to hatred or contempt on the basis of their race, religion and ancestry, contrary to section 2 (1) (b) of the Human Rights Act of British Columbia. Particulars of allegation are attached."

The purpose of notice under the Constitutional Question Act is to give the federal and British Columbia Attorneys General notice of what a party

raising the constitutional issue intends to argue: See Section 8 of the Act. It does not restrict the power of the Tribunal to define the scope of the issues raised in the complaint before it. Leaving aside the question of my jurisdiction to do so, I find it unnecessary and inappropriate to amend the notice. This part of the application is therefore denied.

Appendix 1.4

BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL IN
THE MATTER OF THE HUMAN RIGHTS CODE
S.B.C. 1984, C. 22 (as amended)
AND IN THE MATTER OF A COMPLAINT

NO. 940767 AND 940768

May 14, 1997

BETWEEN:)	
CANADIAN JEWISH CONGRESS)	
COMPLAINANT)	ORAL RULING
)	OF THE
AND:)	TRIBUNAL MEMBER
NORTH SHORE FREE PRESS)	NITYA IYER
d.b.a. NORTH SHORE NEWS)	
And DOUG COLLINS)	
RESPONDENTS)	

* * * *

THE CHAIRPERSON: I am now delivering my ruling on the
Respondents' five applications for summonses.

The Respondents have made application to me
for five summonses. I have heard the arguments
for counsel for all parties, and have carefully
reviewed the documents and authority to which I

was referred. I am now prepared to make my ruling on these applications. In doing so, I will follow the most convenient order.

First, the application in respect of Ms. M.J. O'Brien. This application is granted. Upon Mr. Sutherland providing the Tribunal with the details of the witness's name and address, the summons will be issued in the usual form used by the Tribunal. I have copies of blank summons forms for counsel to peruse, if he so desires, since I know there was some discussion as to the form of summons.

Having granted this summons, I wish to make clear that I do so because I do not know the precise content of the written opinion of this witness nor of the testimony she will give, the purpose for which it will be tendered and no party has objected to the application. However, to the extent that the evidence that will be adduced is legal opinion -- and is legal opinion on one of the issues that I must determine as central to this case, I will require the Respondents to present argument in support of its admissibility and relevance at the time the evidence is sought to be adduced.

Secondly, with respect to the application in respect of Ms. Burka: What is sought in this application is a witness who can give evidence relating to the material the government considered in drafting the legislation in issue. The Respondents seek to adduce this evidence in relation to the requirement under section 1 of the Charter that the legislation have an objective of pressing and substantial importance. Reliance was placed on the Supreme Court of Canada decision in RJR-MacDonald.

In RJR, the appellants conceded that the government's characterization of the Tobacco Products Control Act was pressing and substantial. The evidence tendered -- and the evidence withheld by the government that was the subject of comment by the Court -- was with respect to the minimal impairment test within the proportionality branch of the Oakes test. For your reference, this is at page 345 of the Supreme Court of Canada report, in the judgment of Madam Justice McLachlin.

However, evidence regarding the characterization of the objective of the legislation under section 1 of the Charter is

also admissible. In Edwards Books and Art, another decision of the Supreme Court of Canada, the Court relied on a study by the Ontario Law Reform Commission to assist in its characterization of the legislative objective of the Retail Business Holidays Act as pressing and substantial. This is found at page 769 of the judgment of Chief Justice Dickson.

I understand the Respondents to be applying to summons a witness who can provide evidence relating to some of the considerations the government had before it in drafting Bill 33. Parenthetically, I should note, that like Mr. Sutherland, I cannot discover where section 2 of the Code, which was formally section 2 of the Human Rights Act, is referred to as "section 7" as some counsel have been calling it. Until this is clarified, I would appreciate it if we could all refer to section 2.

The Respondents identified Ms. Burka, then Director of the B.C. Council of Human Rights, as such a witness on the basis of information obtained through Freedom of Information applications. Counsel for the Deputy Chief Commissioner indicated in her submission that

Ms. Burka may not be the most appropriate subject of this summons. It is clear however from the FOI materials in Exhibit 4, that Ms. Burka had some knowledge of some of the material considered by the government in drafting the legislation.

Therefore, I will grant this application for a summons, the individual to be named in it is Ms. Burka, unless the Attorney General or the Deputy Chief Commissioner can assist by advising of a more appropriate and knowledgeable witness. Once again, when the details of the witness are provided to the Tribunal, the summons will be issued in the usual form.

Turning now to the application to summons the custodian or custodians of records within the Ministry of Education and the Ministry of Multiculturalism and Human Rights, and the Ministry of Attorney General in respect of the circumstances of every submission to Crown Council in British Columbia concerning possible prosecutions under section 319 of the Criminal Code.

Counsel for the Respondents submit that this evidence goes to the extent of a "real and pressing need" for this legislation, by which I

take him to mean that it goes to the issue of whether the legislation's objective can be characterized as of such pressing and substantial importance as to warrant overriding a constitutional right, here section 2 (b) of the Charter.

The inquiry into whether a legislative objective is pressing and substantial under the first branch of the Oakes test concerns the mischief or harmfulness of the behaviour that is sought to be controlled. It is not about the frequency of the behaviour -- including the behaviour as possibly measured by legal actions initiated under other legislative regimes which address the same social problem. For example, the legislative objective informing the culpable homicide provisions of the Criminal Code would not become vulnerable to a challenge under section 7 of the Charter simply because no such homicides had been committed in Canada for a period of years. Nor would the objective of provincial legislation dealing with related matters, for example, compensation to victims or their families, become any less constitutionally valid for this reason.

Further, to the extent that the evidence sought by way of this application will be adduced to suggest that the federal legislation satisfactorily addresses the problem of what is commonly called "hate speech," the Respondents are saying that the Human Rights Code is duplicitous or redundant, and therefore not pressing or substantial. That argument is faulty. A federal penal law and a provincial remedial law do not serve the same purposes. As Chief Justice Dickson said in the Taylor decision of the comparable relationship between section 13 (1) of the Canadian Human Rights Act and section 319 (2) of the Criminal Code -- and this is at page 917 of the Supreme Court of Canada Reports -- "It is essential, however, to recognize that, as an instrument especially designed to prevent the spread of prejudice and to foster tolerance and equality in the community, the Canadian Human Rights Act is very different from the Criminal Code. The aim of human rights legislation, and of section 13 (1), is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment." You may also

refer to page 924 and following.

I also note that with respect to counsel's differences of opinion as to the relevance of the Taylor case, my reference to it in this context in any way is not about the extent to which it does or does not determine the constitutional validity of section 2 of the Human Rights Code. Moreover, the language of section 2 of the Human Rights Code is quite different than that of section 319 of the Criminal Code. Indeed, the Respondents take issue with the failure to enact in section 2 of the Human Rights Code provisions analogous to the defenses in section 319.

In any event, it is clear the Respondents do not know what documents exist or what they contain. Counsel supplied alternative theories of how any information obtained from the documents sought might be relevant; for example, the absence of such documents may go to show there is no underlying problem, or the lack of prosecutions, despite a number of requests, may go to show that the Attorney General has failed to consent to prosecutions or failed to take advantage of the legislation.

What the Respondents are seeking is to

discover documents which may prove useful to them. While I have noted Counsel for the Respondents' concern, expressed in his opening statement and elsewhere, about the lack of discovery mechanisms in Human Rights Code, I am bound by the absence of legislative provision for discovery. A summons application is not a substitute for discovery. For your reference, see MacLean and British Columbia (Ministry of Attorney General, Liquor Distribution Branch). The cite is 1993, 26 Canadian Human Rights Reporter, D/83, a decision of the B.C. Council of Human Rights.

For these reasons, I decline to grant this application.

Turning now to the application to summons the custodian or custodians of 42 files being complaints made under section 2 of the Human Rights Act, now the Human Rights Code, over a specified period of time. The reasons I am providing to support my disposition of this application also bear on my disposition of the application to summons Mr. Finding, which I will address after disposing of this application.

The Respondents seeks to adduce this

evidence in relation to the characterization of the objective of the legislation as pressing and substantial, and in relation to the minimal impairment inquiry within the proportionality branch of the section 1 analysis. In oral argument, emphasis was placed on the latter.

As I have indicated in my disposition of the application regarding the section 319 material, the analysis supporting characterization of the legislative objective depends on the mischief or harmfulness of the behaviour the legislation seeks to address, not the frequency with which legal actions are taken under it.

With respect to the argument that the evidence here sought is relevant to the minimal impairment test, the Respondents may be advancing one or both of the following arguments. First, the Respondents may be arguing that the scheme for administration of the prohibition contained in section 2 of the Human Rights Code is unconstitutional. In other words, they may make a general claim that the administrative machinery in the Human Rights Code itself is constitutionally inadequate, in that it is not minimally intrusive when the prohibition being

enforced involves a violation of the guarantee under section 2 (b) of the Charter. Relevant evidence for this purpose is evidence which addresses the design of the scheme as a whole. This factual context is amply provided by an examination of the statute and any regulations, evidence of general policies concerning the administration of the legislation, evidence as to the process followed in relation to this complaint, as well as general studies of the efficacy of the administration of human rights in British Columbia in reports such as that authored by Professor Black.

The second argument that the Respondents may be advancing, is a claim that the legislation was administered unconstitutionally in their case. In this regard, reference was made to the Little Sister's case, a decision of the B.C. Supreme Court.

In Little Sister's, the claim advanced was of unconstitutional administration of the legislation, Little Sister's said it was discriminated against by officials administering the obscenity provisions of custom's legislation, in that material shipped to it received more

scrutiny and was detained more frequently than when the same material was shipped to other bookstores which do not specialize in gay and lesbian material. Thus, the unconstitutionality alleged in the administration of the law was discriminatory treatment as between the plaintiff and other book stores. This meant that the particular experiences of other book stores with the administration of the impugned provisions was relevant.

By contrast, in the case before me, the Respondents are not advancing an argument that other Respondents to other complaints filed under section 2 were afforded better treatment than them. Any argument about unconstitutional administration of the legislative scheme by individuals charged with such responsibility, rests on the particular treatment received by the Respondents in this case. They are therefore in the best position to supply evidence of the flaws they experienced in the investigation and other stages of the administration of this complaint.

Evidence of the particular details of administration of other section 2 complaints, which would be contained in the documents sought,

is irrelevant to either of the constitutional arguments advanced by the Respondents. Either the administrative scheme set out in the legislation itself is generally defective, or an otherwise constitutionally valid scheme was unconstitutionally applied in the Respondents' case. The experiences of particular other individuals with other complaints has no bearing on either of these arguments. I therefore decline to grant this application.

Finally, turning to the application in respect of Mr. Chris Finding. As I have indicated, a similar analysis applies to the disposition of this application. Mr. Finding's testimony with respect to his conduct of the investigation into the complaints before me is relevant to the Respondents' argument about the unconstitutional administration of the complaints filed against them. Evidence that this witness may provide as to the general policies and practices of the former Council of Human Rights in its administration of the legislation is relevant to the Respondents' argument about the unconstitutionality of the legislation itself in

respect of the minimal impairment analysis under section 1 of the Charter.

I will therefore grant the summons. However, I will caution counsel that for the reasons of relevance which I have already indicated, Mr. Finding's evidence should be confined to the matters I have stated. In particular, I can see no relevance at this time to any evidence he may give of the details of other complaints under section 2, whether or not they travelled with the complaint in issue before me for some period of time, nor of the details of any other complaints under section 2, or otherwise, of which he may have knowledge.

This concludes my rulings on the five applications for summonses.

Hollywood propaganda

Doug Collins

"On the Other Hand"

PROPHECY IS risky. But today I prophesy that the Steven Spielberg movie *Schindler's List* will run away with the Academy Awards.

I make that forecast without having seen it and without having any intention of doing so, since it must be the 555th movie or TV program on the "holocaust."

Fifty years after the war one tires of hate literature in the form of films.

B.C. schoolchildren are being trooped in to see this effort. In the name of piety, of course.

But wasn't it Elie Wiesel, a major holocaust propagandist, who said the world should never stop hating the Germans?

Such indoctrination goes on even though Germans born after 1925 or so are no more responsible for the Hitler period than are the Eskimos.

Why we are getting [*sic*] such an overdose of a bad thing?

One reason is that it is profitable in more ways than one.

Billions of dollars are still being paid out in compensation to Israel and "survivors," of whom there seem to be an endless number -- paid out by those same Germans who were not responsible for Hitler.

Anyway, *Swindler's List* will hit the Academy bell because Hollywood is Hollywood and what happened to the Jews during the Second World War is not only the longest lasting but also the most effective propaganda exercise ever.

It is so effective that the mere mention of Auschwitz makes even babes feel guilty.

Dr. Goebbels himself couldn't have done any better. And didn't. From his seat in hell he must be envious.

Hardly a day goes by but that press, radio and television don't mention something about the six million.

The figure is nonsense but media folk go on parroting what everyone "knows." I used to do the same.

That's the safe way, too, for as a recent article in *Vanity Fair* magazine put it, if you question the official version you can expect trouble. But that's an understatement. You will be damned as "anti-Semitic," racist and even Nazi.

After half a century of this the moguls of the movie world reckoned the time was right to cash in in a big way. And Spielberg reckoned it was time for him to cash in, too.

"Movie of the year! Spielberg takes on the Holocaust!" screamed the cover-page in *Newsweek* magazine. You would have thought the war had just ended and that the film was the biggest event since the Battle of Britain.

Critics have fawned on it, especially in the U.S., where many of them work for Jewish-owned media and know how to adjust their safety belts. Others simply reflect what they have been programmed to reflect.

Only one critic has described Spielberg's effort as three hours of propaganda. He was with the Jewish-owned *New York Times*.

Good for him. And them. The exception that proves the rule.

In time of war, propaganda is justified. Fifty years on, it's a bit much. But it comes about because the Jewish influence is the most powerful in Hollywood.

One is not supposed to say that, of course. It's the ultimate in political incorrectness.

But would it be out of order to say such a thing if the Catholics ran Hollywood and we got a stream of Catholic propaganda? I don't think so.

There have been many holocausts but most of them have hardly warranted a paragraph, let alone movies.

Has anyone ever made a film about the two million Armenians killed by the Turks? Or the slaughter of 500,000 Indonesians?

How about the uprooting of 10 million Germans from their homes in East Prussia and Silesia, the murdering of tens of thousands of them by the Red Army and the raping of their women, young and old?

In August 1945, Winston Churchill warned that terrible things were happening. I myself watched masses of desperate refugees streaming into the British Zone of Occupation. (And yes, I know what the Germans did to the Russians).

The Japanese were also skilled in the killing game. Didn't they murder countless Chinese? And Brits and Aussies remember how prisoners were worked and starved to death. And beheaded.

But there has been only one movie on the miseries of life and death in South East Asia -- *Bridge on the River Kwai*. Certainly, there has been no constant propaganda barrage. So now it's all licky-licky for the Japanese. But not for the Germans.

Am I suggesting that Hitler wasn't Hitler or that hundreds of thousands of Jews didn't die in the camps and elsewhere, as did many non-Jews? No. But propaganda is selective and Hollywood propaganda is the most selective of all.

So I won't be watching the Academy Awards. Let me know if my little prediction is wrong.



Appendix 1.1 (Corrected)

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Re: Canadian Jewish Congress and Harry Abrams
-and-
North Shore Free Press dba North Shore News
-and-
Doug Collins
-and-
Harry Abrams
-and-
Robert Howse dba The Daily Victorian
-and-
The Human Rights Act

Counsel for the Attorney General of British Columbia has requested that I address two preliminary issues:

1. Whether the Human Rights Tribunal is a court of competent jurisdiction under section 24(1) of the *Charter*; and

2. Whether the Human Rights Tribunal ought to hear and decide the complaints in this matter before considering the constitutionality of section 2 of the *Human Rights Code*.

In addition to the Memorandum of Argument submitted by Ms. Mrozinski on behalf of the Attorney General, I received and considered submissions from Mr. Sutherland on behalf of the North Shore Free Press and Doug Collins, and Mr. Cuttler on behalf of the Canadian Jewish Congress, as well as the Attorney General's reply to those submissions. I have also received subsequent correspondence from Mr. Sutherland and Mr. Cuttler concerning the scope of the reply; however, it is not necessary that I address that correspondence.

1. Does the Tribunal have jurisdiction to consider the *Charter*?

The Attorney General submits that Mr. Sutherland, counsel for Mr. Collins and the North Shore News, had indicated that he would be seeking a declaration that section 2 of the *Human Rights Code* is unconstitutional and that it be struck down. Mr. Sutherland concedes that the Tribunal does not have jurisdiction to declare section 2 of the *Code* invalid based on the *Charter* and strike the section. Counsel also appear to agree that the Tribunal does have jurisdiction to consider the constitutionality of the *Code* and that, if the Tribunal finds that section 2 violates the *Charter*, the Tribunal must treat the section as invalid.

As no one is seeking a section 24(1) *Charter* remedy it is not necessary for me to consider whether the Tribunal is a "court of competent jurisdiction." In case there remains some uncertainty about the Tribunal's ability to consider constitutional issues, I have reviewed the authorities discussed in the submissions and have concluded that it does have jurisdiction to consider some *Charter* issues including, in particular, whether section 2 violates the *Charter*. In *Cooper v. Canada (Human Rights Commission)*, (unreported, 1996), the Supreme Court of Canada (per La Forest J.) held that a Canadian Human Rights Tribunal "has no ability to question the constitutional validity of a limiting provision of the [*Canadian Human Rights Act*]." This conclusion was specific to limiting provisions. The logic that led to it would not apply to provisions conferring rights rather than limiting them. That the decision applies only to limiting provisions is reflected in the following comments of Chief Justice Lamer in his concurring reasons:

Although my colleagues disagree on the outcome of these appeals, they nevertheless agree on the governing legal proposition: that tribunals that have jurisdiction over the general law, have jurisdiction to refuse to apply -- and hence effectively to render inoperative -- laws that they find to be unconstitutional, since through the operation of s. 52 of the *Constitution Act, 1982*, the Constitution is the supreme law of Canada.

2. Should the merits of the complaints be determined before considering the *Charter*?

The Attorney General submits that the Tribunal should hear the *Charter* challenge only after determining whether a complaint has been made out. I do not agree. The Attorney General's position is based, firstly, on its submission that the Tribunal could only apply the *Charter* if it upheld the complaint and, secondly, that tribunals ought to avoid having recourse to the *Charter* unless it is necessary.

I believe the first submission is incorrect. In my view not only is the Tribunal able to apply the *Charter* before considering the merits but it has a duty to do so in this case. The authority of a Tribunal to consider the *Charter* comes not from the Tribunal's governing statute (except to the extent that it grants the power to consider general law expressly or by implication) but from the Constitution. In *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1991] 3 S.C.R. 570, which was affirmed in the *Cooper* case, La Forest J., speaking for the majority, stated (at p. 594) that:

Section 52(1) of the *Constitution Act, 1982* provides that any law that is inconsistent with the provisions of the Constitution of Canada -- the supreme law of the land -- is, to the extent of its inconsistency, of no force or effect. A tribunal must respect the Constitution so that if it finds invalid a law it is called upon to apply, it is bound to treat it as having no force or effect. [Emphasis added.]

The main thrust of the respondents' defence is that the Tribunal should not apply section 2 of the *Code* because it violates the *Charter*. If the Tribunal, after hearing evidence and argument, agrees with the respondents' position, it would be inappropriate to apply section 2 of the *Code* in determining the merits of the complaints. If the section under which a complaint is made is invalid, the Tribunal may not have jurisdiction to proceed further.

Even if the Tribunal were to assume, for the purpose of determining the merits of the complaint, that the impugned section of the *Code* does not violate the *Charter*, the *Charter* may have a bearing on how the Tribunal interprets that section of the *Code*. Therefore it may not be possible to avoid *Charter* arguments even by adopting the bifurcated approach advanced by the Attorney General.

Finally, I have considered the practical advantages advanced by the parties in support of their respective positions. In my opinion, any practical advantages that may be gained by severing the *Charter* challenge from the merits of the complaints are outweighed by the possibility that a judicial review could follow the decision concerning the merits. Such a review, regardless of whether the Tribunal's decision was for or against the complainants, could lead to a requirement that the constitutional questions be addressed many months and perhaps years after the evidence on the merits. Considering that some evidence may relate to both the merits of the complaints


and the *Charter* issues, that the Tribunal member who conducted the hearing on the merits would be seised of the matter, and that it has already been over three years since the articles at issue were published, such a delay is to be avoided if at all possible.

It is arguable that the *Charter* challenge should be determined before considering the merits of the complaints. However, counsel appear to be in agreement that the constitutional question should not be made in a factual vacuum. I think they are correct. I have concluded therefore that the Tribunal should hear the evidence and argument related to the complaints and to the constitutional issues together.

Hearing Dates

These complaints should now be set for hearing. An early date is desirable. I do not wish to impose a date on the parties if I can avoid it. Therefore I request that you discuss dates amongst yourselves. If you can agree on a dates, it is likely that the Tribunal will be able to accommodate them. If you have not reached agreement by February 12, 1997, the Tribunal will set dates for you.

Yours truly,



Tom W. Patch
Tribunal Member



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WHAT IS THE BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL?

The Human Rights Tribunal is an independent, quasi-judicial provincial body that adjudicates and mediates human rights complaints under the British Columbia *Human Rights Code*.

The Tribunal consists of a Chair, three full-time and two part-time appointed members and three support staff. The Tribunal operates within an annual budget of \$1.1 million.

WHAT IS THE TRIBUNAL'S MANDATE?

The Tribunal conducts public hearings on complaints that have been referred to it by the British Columbia Human Rights Commission. Discrimination complaints may be based on race, colour, age, sex, sexual orientation, physical or mental disability, religion, marital status, family status, place of origin or ancestry. The *Human Rights Code* covers discrimination in a variety of contexts, including tenancy, employment, employment advertisements, publications, public services and facilities, purchase of property and discrimination by unions or associations.

At a Tribunal hearing, the parties have an opportunity to present evidence to support their case. A decision, with reasons, is issued by the Tribunal member or panel. Copies of these decisions are available from the Tribunal. The Tribunal does not publicly comment on its decisions nor does it issue Press Releases.

Once a case has been referred to the Tribunal by the Commission, the *Code* requires the Tribunal to hold a hearing unless the complaint settles or is withdrawn by the Complainant. The Tribunal encourages parties to reach mutually agreeable settlements and may assign a mediator to assist them in the informal resolution of complaints prior to a hearing.

WHAT IS THE DIFFERENCE BETWEEN THE B.C. HUMAN RIGHTS TRIBUNAL AND THE B.C. HUMAN RIGHTS COMMISSION?

The Human Rights Tribunal is completely independent from the Human Rights Commission. The two bodies have separate mandates and separate administrative processes. The Commission receives and investigates complaints and, in some cases, refers a complaint to the Human Rights Tribunal which then conducts a hearing. The Tribunal only adjudicates complaints that have been referred to it by the Commission after an investigation. The Tribunal does not investigate complaints.

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